Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

IN EQUITY. No. 382.

ATLANTIC COAST LINE RAILROAD COMPANY, *Appellant*,

vs.

A. D. WATTS AND A. D. WATTS AS COMMISSIONER OF REVENUE, ET AL., *Appellees.*

REPLY BRIEF OF APPELLANT.

THOMAS W. DAVIS,
HARRY SKINNER,
Solicitors for Appellant.

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REPLY BRIEF OF APPELLANT.

We desire to call to the attention of the Court, in addition to the points already made, the following concrete propositions:

I.

The assessment complained of is that of 1921, which violates the statutory method and is, therefore, on a wrong principle. This has nothing to do with fraud or systematic discrimination.

Section 28(b) of Chapter 38 of the Laws of 1921 reads in part as follows:

"Sec. 28(b). *Specific complaints.*

"The board of county commissioners of the several counties shall have and exercise authority to hear and determine specific complaints of over-valuation or under-valuation of any particular tracts of real property, and after the general equalization order provided for in the preceding subsection has been made, any person who owns property subject to taxation, and who finds that said property stands assessed for taxation, after su h equalization order has been made, at an amount in excess of the actual value of such property on the first day of May, one thousand nine hundred and twenty-one, may have the right to have the same *reassessed* and *reappraised* by the said board, by filing with the clerk of the board of county commissioners, some time during the month of May, one thousand nine hundred and twenty-one, etc." (Italics ours.)

Section 28(g) reads as follows:

"Sec. 28(g). Any taxpayer owning property assessed originally by the State Tax Commission may make application to the State Tax Commission for a review of the assessment of its property in the same manner herein provided for complaint by property owners before the county boards, and the State Tax Commission may hear and determine such complaints."

The railroads made application to the Commissioner of Revenue for review under the above Section 28(g), and it is our contention that when we

applied for the review or reassessment, contending that the assessment was in excess of actual value of the property, that the Commissioner of Revenue was compelled to have some measure for determining the correctness of our contention. That measure was whether or not the assessment of 1921 was in excess of true value according to law as it then existed in the State of North Carolina, and the law then in existence and which should have controlled the Commissioner of Revenue was Sections 64 and 65 of the Machinery Act, which Sections were a part of the Act of March 10, 1919, and also of the Act of 1921. The power to review or reassess or reduce the assessment is equivalent to making a new assessment and the result is a new assessment. We submit that when the Revenue Commissioner adopted the assessment of 1920 he adopted the method of arriving at it. If Appellants have shown that the assessments complained of did not follow those Sections, we submit that we have sustained this point. We ask that the Court bear in mind that, irrespective of what method was adopted under Section 64, no method, so far as an interstate railroad was concerned, could be legally adopted which did not comply with Section 65, which provided for the finding of a total value and a division thereof on a mileage basis. If there be any contention that Section 65 was followed, the facts contained in the Tax Commission's affidavit show to the contrary. If we admit, for argument's sake, that there is no statement in the record affirmatively showing that the Tax Commission and the Commissioner of Reve-

nue did not consider all the elements and finally come to the selected method as the correct result of such consideration, we still have the proof that Section 65 was not followed, because Appellees' contention only extends to using the investment account in our case, for which there is no authority, or the earnings within the State in the case of the Southern Railway and not the earnings for the entire line.

Without repetition, we refer the Court in this connection to the reply brief filed by the Southern Railway Company in case No. 368 as setting forth more fully the foregoing contentions.

II.

If it be held that we have to go back to the 1920 assessment, which was approved by the Legislature, we desire to say: It is admitted that what the Legislature could have authorized it can as a general proposition ratify if it could authorize at the time it ratifies, but that is not the proposition that we have before the Court. Our proposition is that the Tax Commission, by its own statement, has sworn that it made certain of the assessments on one basis and certain others on an entirely different basis and, therefore, there was discrimination between members of a class, contrary to the Uniformity Section of the North Carolina Constitution and the enforcement of such assessments deprives these Appellants of the equal protection of the laws guaranteed by the Federal Constitution. It matters not whether such assessments, if they do violate the Constitution, are made by the

Tax Commission or made by the Legislature. The Legislature is just as powerless to enact a law contrary to the Constitution as is the Tax Commission to enforce such a law. For the facts on this, we ask leave to again refer to the reply brief of Southern Railway Company.

III.

As will have been observed, in 1920 all taxpayers, including railroads, were theoretically put upon an equality, namely, assessed at one hundred per cent (which we deny as to railroads and say that it was in excess of one hundred per cent). The Legislature destroyed that equality by enacting Section 28(a), which gave to the County Boards of Equalization the right to make an average percentage reduction in all real values in the counties. The railroads were given no similar right and no such reduction. This Act in itself, we submit, being an average reduction, can not be held to be compliance with the North Carolina Constitution, which requires the assessment of each individual's property at true value, and it does not permit any average assessment of any kind, and, therefore, that Section of the Act in itself shows a scheme of discrimination against the railroads which was taken advantage of by sixty-seven counties. At this point, permit us to say that the reason the thirty-three counties which did not make average reductions did not complain is because there was not in 1921 any general levy applicable throughout the State for State purposes. Consequently, the thirty-three counties decided that, having a

given amount of money to raise, they would keep their rate of taxation down and their assessments up, which would bring in the same amount of money as to reduce their assessments and increase their rate. If there had been a general State levy, then the thirty-three counties would have been discriminated against and would not for a moment have permitted the reduction in assessment to continue in the sixty-seven counties without similar relief. The railroads were harmed in that their property was held up to the high assessment in the sixty-seven counties and throughout the State and they were made to pay the increased county rates of taxation, the county rates being increased in amounts varying from 12c to 84c per hundred dollars. We do not think that Appellants should be deprived of protection under the law simply because the action of the sixty-seven counties did not in the year 1921 adversely affect the remaining thirty-three counties. We further submit that this is not sporadic; that it is a general and intentional discrimination against railroads.

The further material facts on this discrimination, created by the law itself, and on the general contention of systematic discrimination to which the Court's attention is specifically called is the following quotation from the Tax Commission's Report which explains why railroads were increased only double and other property quadruple:

> "The new assessment of railroads does not represent as great an increase as the average increase of other property, for the reason that

they were assessed relatively higher than other property before, etc." (Report of Tax Commission to Governor, dated August 10, 1920, rec. 79.)

and, as to lands generally, the following quotation from their report:

"The United States Department of Agriculture makes an annual appraisal of the average value of farm lands in all states. Their estimate of 1919 average value for this State was $47.00 per acre; for 1920, $75.00 per acre. The revaluation average was $38.94, or $8.00 per acre less than the 1919 average. This demonstrates that the revaluation values did not approximate the peak of speculative values." (P. 73, Southern Railway record.)

The evidence introduced of all deeds recorded from January 1, 1921, to July 1, 1921, some six thousand in number, covering transfers totaling thirty million dollars of property, assessed at twenty-two million dollars (using round figures) was the only period available, the revaluation having taken place in 1920 and to have gone back of the revaluation would not have been of value.

In 1920 the railroads, notwithstanding their assessments had been doubled, paid less taxes than they did in former years, due to the lower rate of taxation, whereas other property holders paid more taxes. This situation could not continue. When all real assessments other than railroads were reduced in the sixty-seven counties and tax rates increased, the status prior to revaluation was resumed.

IV.

We desire to emphasize the contention made in all briefs in chief, except the Norfolk Southern, that Section 82(3½) absolutely applied and, as a consequence, the franchise taxes, if they are valid, should have been one-half of the amount assessed. We have nowhere seen any answer that at all satisfies our minds on this proposition.

V.

We desire to respectfully point out that the franchise or privilege tax is void for the reasons heretofore given and insisted upon, namely:

(1) That it is a property tax. Being a property tax and not levied on other persons and corporations, it violates the Uniformity Section of the North Carolina Constitution and also violates the statute of North Carolina, Section 3 of the Machinery Act of 1921, which provides, "no tax on any property in the State shall be levied for any of the uses of the State Government, etc."

(2) That it is a burden on interstate commerce.

(3) That the payment of it is a condition precedent to the doing of any business, including interstate business, and is in violation of the commerce clause of the Constitution of the United States.

Respectfully submitted,

THOMAS W. DAVIS,
HARRY SKINNER,
Solicitors for Appellant.

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IN THE

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY,
Appellant,
vs.
A. D. WATTS, ET AL.,
Appellee.

In Equity
No. 368

BRIEF IN SUPPORT OF PETITION FOR STAY PENDING APPEAL TO THIS COURT UNDER SECTION 266 OF THE JUDICIAL CODE.

S. R. PRINCE,
Attorney for Appellant.

L. E. JEFFRIES,
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C. O. AMONETTE,
Of Counsel.

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IN THE

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY, *Appellant,* *vs.* A. D. WATTS, ET AL., *Appellee.*	In Equity No. 927

BRIEF IN SUPPORT OF PETITION FOR STAY PENDING APPEAL TO THIS COURT UNDER SECTION 266 OF THE JUDICIAL CODE.

Statement of Facts

The petition filed sets forth the basis of this suit and the successive steps taken in this suit up to date. As concisely as can be stated, the situation of petitioner is:

For the year 1919 the ad valorem assessment of appellant in the State of North Carolina was

$46,869,942.00. In 1920 the ad valorem assessment was increased to $96,605,694.00. Appellant paid its 1920 taxes thereon under written protest. Due to the reduced tax rate and there being no State tax, the actual amount of taxes paid in 1920 on the higher assessment was less than the tax paid in 1919 on the reduced assessment. In 1921 appellant's assessment was $96,306,357.00, being the same as 1920, except for minor changes in local property lying off the right of way. A hearing was had before the Commissioner of Revenue and testimony introduced to show that the assessment was in excess of the true "actual value," and it was earnestly contended that appellant was entitled to the same horizontal reductions on its right of way land in the several counties as had been given all other real property in said counties. The assessment was not reduced.

In 1919 the General Assembly of North Carolina passed a law (Laws of North Carolina 1919, page 115) providing for a revaluation of all the property in the State. At the Extra Session in 1920 (Public Laws, Extra Session, 1920, Chapter 1) the Legislature adopted the revaluation. In that law (Section 7) it was provided that there should be no ad valorem tax for the use of the State, but in lieu of that there should be levied a franchise tax. Under this law, the franchise tax on this railway company was increased from $10.00 per mile to one-tenth of one per cent on the ad valorem assessment. Under this, appel-

lant's franchise tax was increased from $10,930.00 in 1919 to $96,306.00 in 1921.

The next step was the enactment of Section 28(a) of the Machinery Act of 1921 in which County Boards were given the right to make a horizontal reduction in assessments in their respective counties. The County Boards did not have the right to reduce the railroad's assessments, because they did not make the assessments and had no jurisdiction of them. Thirty-two counties through which appellant operates made horizontal reductions in the assessment of real property ranging from 10 to 50 per cent. The Commissioner of Revenue declined to make any reduction in appellant's property. In all except two counties through which appellant operates there was a heavy increase in the rate of taxation ranging from 12¼ to 84 cents per hundred dollars. If the assessment remains, appellant will pay in actual taxes for the year 1921 the sum of $1,243,-715.00, an increase of $368,622.00 over 1920. Under an agreement of counsel, approved by the Court, appellant has paid its taxes on a sixty million dollar valuation and the amount paid to counties, cities, towns and school districts is $61,000.00 in excess of the amount paid in 1920 on the ninety-six million dollar valuation. This is due to the increase in the rate of taxation.

The State in its answer avers that the assessment of ninety-six million dollars for 1921 is the true actual value of appellant's property. Appel-

lant shows that it is in excess of the true actual value. Under the capitalization of earnings plan, it was excessive to the amount of twenty-five million dollars. Under the market value of stock and bonds plan, it was excessive to the extent of fifty million dollars. Under the replacement value, it was excessive to the extent of thirty-five million dollars.

Real property generally in the State was assessed for the year 1921 at 67 per cent of its true value, as evidenced by a complete list of all deeds recorded in every county in the State January 1, 1921, to July 1, 1921, where the consideration was in excess of $1,000.00. This list contained in excess of 6,400 deeds and showed the deed value as compared with the assessed value. The total of the recorded deed value was $30,598,475.24 and the total assessed value of the same property was $20,373,684.07, or approximately 67 per cent.

Brief.

Petitioner is granted by Section 266 of the Judicial Code an appeal to this Court from the denial of a restraining order by the District Court and the two judges called to his assistance. If the appeal is to be of any value to the petitioner, the status quo should remain until that appeal can be heard and determined. Appellant thought and still thinks that the Three Judge Court had the power and that it was its duty to maintain

the status until the appeal could be heard. That view is based upon the following decisions:

In the case of L. & N. R. R. Co. vs. Siler, 186 Fed. 176, the Three Judge Court continued the status quo pending the appeal. The Court said, beginning on page 203:

> "It follows that the motion for an interlocutory injunction in both its branches must be denied. However, the questions involved are of such importance that we assume that a review of our conclusions will be desired by complainant, pursuant to the special provision for such review found in section 17 of the act of June 18, 1910. If the Supreme Court, on such review, shall decide that complainant was entitled to this injunction, then it is apparent that our present refusal to grant the injunction would result in irremediable injury, on account of failure to preserve the status quo. Applying the reasons of the rule stated in Hovey vs. McDonald, 109 U. S. 150,161,3 Sup.Ct.136, 27 L.Ed.388, and further stated in Cotting vs. Kansas City Stockyards Co., supra, 183 U. S. 79, 80, 22 Sup. Ct. 30, 46 L. Ed. 82, we have concluded that the restraining order of September 7, 1910, should be continued until an opportunity has been given for the complainant to secure a review, and subject to conditions which will be prescribed in the order to be entered."

Attention is directed especially to this language of that court: "If the Supreme Court, on such review, shall decide that complainant was entitled

to this injunction, then it is apparent that our present refusal to grant the injunction would result in irremediable injury, on account of failure to preserve the status quo." That language is equally applicable to this case. Should the Supreme Court of the United States decide that this complainant is entitled to the injunction applied for, then the refusal of this Court to preserve the status quo would result in irremediable injury to complainant.

In Ohio River & W. Ry. Co. vs. Ditty, 203 Fed. 537, the Three Judge Court continued in effect the restraining orders until the plaintiffs should have an opportunity to secure a review. The Court said, beginning on page 549, as follows:

> "It follows that the motion for an interlocutory injunction in each case must be denied. However, the questions involved are of such importance that we assume that a review of our conclusions will be desired by the plaintiffs, pursuant to the special provision found in section 266, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1162 (U. S. Comp. St. Supp. 1911, p. 236).
>
> "We have accordingly concluded that the restraining orders heretofore granted shall be continued until an opportunity has been given for the plaintiffs to secure a review, and subject to conditions which will be prescribed in the order to be entered."

In Grand Trunk Ry. Co. vs. Michigan Railroad Commission, 198 Fed. 1009, the Three Judge

Court withheld the formal entry of orders in accordance with its opinion in order to give complainants an opportunity to present application for a continuance of the restraining order pending the appeal. The Court said on page 1023 as follows:

> "It follows from what has been said that the application for interlocutory injunction should be denied, and the existing restraining order vacated. As the questions presented are important and review may be desired, the formal entry of the orders in accordance with this opinion will be withheld until September 5th, next, to give complainants opportunity to present such applications as they may desire for a continuance of the restraining order pending appeal (under the rule stated in Hovey vs. McDonald, 109 U. S. 150, 161, 3 Sup. Ct. 136, 27 L. Ed. 888, and Cotting vs. Kansas City Stockyards Co., 183 U. S. 79, 80, 22 Sup. Ct. 30, 46 L. Ed. 92) in case such appeal is to be taken."

In Phoenix Ry. Co. of Arizona vs. Geary, 209 Fed. 694, the Three Judge Court, while denying the motion for an interlocutory injunction, continued the restraining order in force pending the appeal. This action of the Three Judge Court was tacitly approved by the Supreme Court of the United States in Phoenix Ry. Co. vs. Geary, 239 U. S. 277, in which case the Court said on page 281 as follows:

> "The Court held (209 Fed. Rep. 694) that complainant's showing as to the alleged unreasonableness of the Commission's order was not sufficiently strong to warrant an injunction to restrain its enforcement *pendente lite*, but the temporary restraining order was continued in force pending the present appeal, taken direct to this court under the cited section of the code."

We have found no case to the contrary. The diligence of appellee's counsel found no case to the contrary, and their only reliance was the specially concurring opinion of Judge Shelby in the case of L. & N. vs. Railroad Commission, 208 Fed. 29, at page 58. It will be noted that this was a specially concurring opinion, the reasoning of which was not agreed to by the Court, and that the Court in that case ordered:

> "It is therefore ordered that the plaintiff's application for the allowance of the appeal and for supersedeas or a restraining order against the enforcement of the order of the Railroad Commission of Alabama, pending the appeal, be denied, the court not passing upon the merits of the application, and without prejudice to the right of the plaintiff to renew its application for an appeal and for a restraining order, pending the appeal, in the Supreme Court, or as it may be advised."

The Three Judge Court did not in this case pass upon the merits of the motion for a stay, but expressed the opinion that the Supreme Court

was the proper court to grant the stay (Order of April 15, 1922, p. 9 of Motion). It stayed the State's hand for two thirty-day periods upon the idea that not to do so would be an injustice to appellant. For the same reason that the State's hand was stayed sixty days, it should be stayed until this court can pass upon the appeal.

This Court has the undoubted power and authority to continue the stay in effect. This is the view of this Court on the general question of the powers of an equity court, which powers apply with equal force to an appeal under Section 266 of the Judicial Code. The leading case is that of Hovey vs. McDonald, 109 U. S. 150. In that case the Supreme Court of the United States discussed the power of the lower court to maintain the status quo on page 161 of the opinion as follows:

> "It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requisities for a supersedeas were complied with. It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the status quo until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or non-exercise is not an appealable matter. In recognition of this power,

and for the purpose of facilitating its proper exercise in certain cases, on appeals from the circuit courts, this court by an additional rule of practice in equity, adopted in October term, 1878, declared that:

"'When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.' Rule 93."

The Court also said on page 162 as follows:

"Applying these principles to the present case, it is clear that the force of the decree was not affected by the appeal, although it was in the power of the special term to have continued the injunction and to have retained the fund in its control in the hands of the Receiver had it seen fit to do so. Judging only from what appears in the record, we cannot refrain from saying that, in this case, the latter course would have been eminently proper. It would have protected all parties and produced injury to none. But if the court failed to do what it might properly have done, such failure ought not to be visited upon the receiver, who was the mere instrument and hand of the court, and subject to its order. It was his duty to obey the decree as made."

Unless the stay applied for is granted the tax collecting authorities of North Carolina will proceed at once to collect the tax, the validity of which is involved in this suit. Should such tax be collected and disbursed prior to the determination of this case, a victory on the part of complainant would be fruitless.

The principles enunciated in Hovey vs. McDonald were applied in Cotting vs. Kansas City Stockyards Company, 82 Fed. 850. In that case the Court said on page 857 as follows:

> "The great importance of the questions involved in these cases will doubtless occasion an appeal to the Supreme Court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stockyards company would sustain a great and irreparable loss. Under such circumstances, as was said, in substance, by the supreme court in Hovey vs. McDonald, 109 U. S. 150, 161, 3 Sup. Ct. 136, it is the right and duty of the trial court to maintain, if possible, the status quo pending an appeal, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are of such moment, and the questions at issue so balanced with doubt, as to justify and require an exercise of the power in question. Therefore, although the

bills will be dismissed, yet an order will at the same time be entered restoring and continuing in force the injunction which was heretofore granted, for the term of 10 days, and if, in the meantime, an appeal shall be taken, such injunction will be continued in force until the appeal is heard and determined in the supreme court of the United States; provided that, in addition to the ordinary appeal bond, the Kansas City Stock Yards Company shall make and file in this court its bond in the penal sum of $200,000, payable to the clerk of this court and his successors in office, for the benefit of whom it may concern, conditioned that, in the event the decree dismissing the bills is affirmed, it will, on demand, pay to the party or parties entitled thereto all overcharges for yarding and feeding live stock at its stock yards in Kansas City, Kan., and Kansas City, Mo., which it may have exacted in violation of sections 4 and 5 of the Kansas statute relative to stock yards, approved March 3, 1897, since an injunction was first awarded herein, to-wit, on April , 1897, and that it will in like manner pay such overcharges, if any, as it may continue to exact in violation of said statute during the pendency of the appeal; said obligation to become void if the statute in question shall be pronounced invalid by the supreme court."

In the case of Omaha and Council Bluffs Street Railway Co. vs. I. C. C., 222 U. S., 582, this Court held that it was proper for an order to be entered by it to maintain the status quo pending an appeal

from the judgment of the Commerce Court sustaining an order of the Interstate Commerce Commission.

This Court, in the case of Journal of Commerce and Commercial Bulletin vs. Burleson, 229 U. S., 600, granted a restraining order pending a decision. See to the same effect In re Alexander McKenzie, Petitioner, 180 U. S., 536, at page 549, and U. S. vs. Shipp, 203 U. S., 563, at page 573.

Appellant has not delayed the trial of this case in any way for any length of time. It has offered to try the case on its merits at the June Term of the Federal Court. We still believe that it was the duty of the lower court to pass upon this question of maintaining the status quo, because that Court knew all the facts and had examined into the question in order to pass upon the motion for an interlocutory injunction, and it seems to us proper that that Court should pass upon the question of granting or not granting the stay. We have not the slightest doubt that if the lower court had been of the opinion that it was the proper forum to pass upon the question of maintaining the status that the stay would have been granted.

As to irreparable damage which will be suffered should the stay not be granted—appellant will be compelled to bring 160 suits to recover the amount of the taxes paid if finally held to be illegally paid, and that alone is irreparable damage. The irreparable injury should be determined not so much

upon the question of whether appellee may not recover the tax, but, we submit, is based upon the fact that the statute, 266 of the Judicial Code of the United States, allows appellant an appeal from the failure to grant an interlocutory injunction, and unless the status quo is maintained, this appellant is virtually denied the right given it, because an appeal will be valueless unless the status quo is maintained. This Court, in the exercise of its equity powers, is not held to an exercise of them, only in the case of irreparable damage. In other words, in this case the appellant is not required to show the irreparable injury in the strict sense of the word, in so far as the ultimate outcome is concerned. As stated, we have a right to the appeal, and if not to maintain the status will irreparably deprive us of it unless the relief sought is granted, then irreparable damage follows.

In the case of N. C. & St. L. Ry. Co. vs. M'Connell, 82 Fed., 65, the Railway sought an injunction against ticket scalpers, that is, persons who bought up unused portions of return trip tickets and sold them. The Court held that plaintiff was entitled to an injunction. On page 68 the Court discussed the relief or redress of the carrier in case the injunction was not granted. It held that complainants were without adequate redress at law, due to the large number of suits for small amounts which would have to be instituted if the carrier was confined to his remedy at law. The Court said on this particular point:

> "If 500 separate suits at law for breach of the contract in each ticket is the only mode of redress to the carrier, it requires no comment to show that here is a striking failure of justice. The injury is obviously irreparable."

In addition to that, there is no law permitting suit against the State for the recovery of the franchise tax of ninety-six thousand dollars, which is payable direct to the State, and if that tax be held illegal, there is no method prescribed to recover the sum. The State of North Carolina has not consented to be sued therefor.

Appellant is embarrassed in the briefing of this motion because it is refraining from discussing the merits of the controversy now pending on the appeal. The assessment so made and complained of will remain for three years, and the amount involved for this appellant is in excess of one million dollars.

The Court's attention is directed to the stipulation of record between counsel for the parties, that notwithstanding the stay granted by the lower court expires May 15th, the status quo is to remain until this Court has passed upon the motion here presented.

Respectfully submitted,

S. R. PRINCE,
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C. O. AMONETTE,
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IN THE

Supreme Court of the United States

October Term, 1928

No. 382

NORFOLK SOUTHERN RAILROAD COMPANY,
Appellant,

vs.

A. D. WATTS AND A. D. WATTS, AS COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA, ET ALS,
Defendants.

BRIEF OF APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

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NORFOLK SOUTHERN RAILROAD COMPANY,
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BRIEF OF APPELLANT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 383

NORFOLK SOUTHERN RAILROAD COMPANY,
Appellant

vs.

A. D. WATTS, and A. D. WATTS, as Commissioner of Revenue of the State of North Carolina, et als,
Defendants.

BRIEF FILED ON BEHALF OF APPELLANT

This is an appeal under Section 266 of the Judicial Code, from an order of the United States District Court, for the Eastern District of North Carolina, denying a motion for an interlocutory injunction *pendente lite.*

STATEMENT OF CASE

Appellant, plaintiff below, a Virginia corporation, operating a system of railroad situate in Virginia and North Carolina, filed its bill in the United States District Court, for the Eastern District of North Carolina, against A. D. Watts, individually and as Commissioner of the State of North Carolina, (who under the laws of the State is charged with the duty of assessing for taxation the property of railroad companies;) the State officers and tax collectors of the several political subdivisions of the State, charged with the duty of collecting taxes, seeking

to have declared illegal and void, and to enjoin the collection of:

(A) A tax of one tenth of one per cent of the value of plaintiff's entire property (as assessed for ad valorem taxation), levied for support of the State, under the provisions of Section 82 (6½) of the Revenue Act of 1921, called a trade tax, upon the ground:

1. That this tax is in truth and in fact a tax upon property and void under the State Constitution, as violating the Uniformity Clause thereof, and being twice the amount which can be levied upon property for support of the State government.

2. If the tax be a trade tax, it is assessed and levied for the privilege of carrying on interstate commerce, and therefore, in conflict with the commerce clause of the Federal Constitution.

3. If the tax be a trade tax, it is controlled by Section 82 (3½) of the Revenue Act of 1921, and so controlled, violates the 14th Amendment to the Federal Constitution.

(B) An assessment made by the Commissioner of Revenue of plaintiff's property in the State, for the purpose of ad valorem taxation, for the support of the political subdivisions of the State, and as a measure of the so called trade tax, upon the ground:

1. That the assessment as made was not made in accordance with the laws of the State; and,

2. Under the laws of the State, and the practice of the assessing officers, the property of plaintiff, and other railroad corporations, is valued for taxation in violation of the uniformity clause of both State and Federal Constitutions, when compared with the valuation of the property of other tax payers.

3. The State Tax Commission has imported values in the State in violation of the 14th Amendment to the Federal Constitution. Plaintiff prayed for an injunction against the collection of the trades tax, and against the use of the illegal assessment as a measure of the ad valorem taxes, and for an interlocutory injunction pending final hearing.

The motion for interlocutory injunction was denied and plaintiff appealed.

Three questions arise on the record:

1. The validity of the so called trade tax.
2. The validity of the assessment of plaintiff's property.
3. Plaintiff's right to injunctive relief.

The Constitution of the State, and the State statutes, so far as material, will be set out in full in an appendix hereto.

The Revenue and Machinery Acts vest certain powers in the State Tax Commission. By virtue of Chapter 40, Public Laws 1921, these duties were, on and after May 1, 1921, to be performed by the Commissioner of Revenue.

This brief will be divided into two parts, the first relating solely to the validity of the so called trade tax, the other to the assessment. The facts as to each branch of the case will be stated separately.

PART I

TRADE TAX

STATEMENT OF FACTS

Plaintiff, a Virginia corporation, operates a line of railroad located in the states of North Carolina and Virginia, over which it conducts the business of a common carrier of goods and passengers in both interstate and intrastate commerce.

Plaintiff, in addition to its said lines of railroad, owns either the fee or a leasehold interest in a large amount of other property. See p. r. page 75.

Plaintiff's entire property in North Carolina was, for the year 1921, assessed by the Commissioner of Revenue, for ad valorem taxation at $22,840,932.00.

The Commissioner of Revenue certified this valuation to the State Auditor, in order that he might assess against plaintiff for the support of the State government and also certify to the State Treasurer for collection the tax authorized by Section 82 (6½), of the Revenue Act of 1921.

The State Auditor certified to the State Treasurer a tax of

$22,840.92 as being due from plaintiff under said Section 82 (6½), and notified plaintiff that unless this tax was paid by September 15, 1921 the pains and penalties authorized by law would be inflicted.

See bill, sec. 28 p. r. page 14 and sec. 28 of answer, page 42, p. r.

Section 82 (6½) of the Revenue Act provides:

"*Railroads.* Every railroad company doing business in this State shall annually on or before the thirtieth day of July make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission, and giving such information as the State Tax Commission shall require, for the purpose of carrying out the provisions of this section, and upon which report the State Tax Commission shall ascertain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for *ad valorem* taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth per cent (0.1 per cent) of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for, it shall be the duty of the State Tax Commission to make an approximation from the reports and records on file in that department of the amount of taxes due under this section, and certify same to the State Auditor and Treasurer for collection. No county, city or town shall be allowed to collect any taxes under this section."

It was admitted that plaintiff was engaged in conducting and carrying on over its line of railroad the business of a common carrier of goods and passengers in interstate commerce.

See sec. 25 of bill and answer, pages 12 and 13 and 41 of p. r.

Defendant alleged that the tax was one laid for the privilege of doing intrastate business alone.

See answer, sec. 28, p. r. page 42.

It was admitted that this tax was levied for the support of the State government, that no tax was levied or assessed against property of any other tax payers for the support of the State government. The statutes so provide.

Plaintiff assigned as error and as grounds of appeal, the error of the Court:

1. In failing to hold that this tax was in truth and in fact a property tax and as such in violation of the Constitution of the State, Article V, Sec. 3 and 6.

2. In failing to hold that this tax, if a trade tax, was a tax levied for the privilege of carrying on interstate commerce, and as such burdened interstate commerce in violation of Article 1, Sec. 8, clause 3 of the Federal Constitution.

3. In failing to hold that Sec. 82 (3½) applied to and controlled Sec. 82 (6½), and as such brought the statute in conflict with the 14th Amendment of the Federal Constitution.

4. In failing to hold that the plaintiff, upon the pleadings and facts, was entitled to injunctive relief.

See assignments of error 10 to 20 inclusive, pages 103, 104 p. r.

ARGUMENT

THE TAX IN QUESTION IS A PROPERTY TAX AND AS SUCH VOID UNDER THE STATE CONSTITUTION.

"The substance, not the shadow, determines the validity of the exercise of the power," (of taxation.)

Postal Tel. Cable Co. v. Adams, 155 U. C., 688, 698.

"We must regard the substance, rather than the form, and

the controlling test is to be found in the operation and effect of the law."

St. Louis S. W. R. Co. v. Arkansas, 235 U. S., 350, 362.

"Neither the state courts nor the legislature, by giving the tax a particular name, or by the use of some form of words can take away our duty to consider its nature and effect."

Galveston H. & S. A. R. Co. v. Texas, 210 U. S., 217, 227.

If it bears upon property so directly as to amount to a property tax, calling it a trade tax will not save it.

The State Constitution, Article V, Sec. 3, provides:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, according to its true value in money. . . . The General Assembly may also tax trades, professions, franchises and incomes. . . ."

Section 6 limits the property tax for State purposes to five cents on the hundred dollars.

For full text of Constitution, appendix, page 76.

It cannot be denied that if this tax be in truth and in fact a tax upon property, then it is void, for it is a tax imposed for the support of the State, (Sec. 3, Revenue Act, appendix, page 82) and is not imposed upon all property in the State by a uniform rule, which is necessary under the Constitution.

Speaking of this question in Kyle v. Mayor of Fayetteville, 75 N. C., at page 447, Bynum, J., said:

> "'It is the provision and purpose of the Constitution that thereafter there should be no discrimination in taxation in favor of any class, person or interest, but that everything real or personal possessing value as property and the subject of ownership, shall be taxed equally and by uniform rule.' A statement fully approved in Puitt v. Commissioners, 94 N. C,. 709 and many other cases. A law, therefore, cannot exempt the property of individuals of a county,

township, etc., while imposing a tax on property of same kind belonging to corporations, and the statute authorizing such a tax cannot be enforced."

Keith v. Lockhart, 171 N. C., 451, 457.

"The provisions in our State Constitution with regard to equality and uniformity were copied from the Constitution of Ohio, and in that State it has been held that: 'Taxing is required by a uniform rule, that is by one and the same unvarying standard. Taxing by a uniform rule requires uniformity in the mode of assessment upon the taxable valution. Uniformity in taxation implies uniformity in burdens of taxation, and the equality of burdens cannot exist without uniformity in the mode of assessment as well as the rate of taxation. Bank of Columbus v. Hines, 3 Ohio S. Rep.'"

Worth v. Railroad, 89 N. C., 301-309.

"Under the construction of the Constitution, as declared in Pullen's case, it would be in the discretion of the Legislature to unequally distribute the burden necessarily incident to government, and the worst species of class legislation would be tolerated. It would (says Dixon, C. J., in Knowlton v. Supervisors, 9 Wis., 422) "make the Constitution operative only to the extent of prohibiting the Legislature from discrimination in favor of particular individuals, and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the Legislature, 'You shall not discriminate between single individuals or corporations, but you may divide the citizens up into different classes as . . . owners of different species or descriptions of property, and legislate for one class and against another as much as you please, provided you serve all of the favored or unfavored classes alike,' thus affording direct and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust that

it will not find an apologist anywhere—at least outside of those who are the recipients of its favors."

"Such a construction, in our opinion, not only offends the true spirit of the Constitution, but has been distinctly and solemnly repudiated by the uniform decisions of this Court in subsequent cases. These cases decide that when the taxing power is exercisel for a public purpose, the Constitution, and not the Legislature, declares what property shall be taxed, and that it requires that all shall be taxed and by a uniform rule and ad valorem. This construction is conceded, as to State and county taxation, under section 3, Art 5, and we are unable to conceive why the same rule should not apply to section 9, article 7, as the language of the latter is even more imperative than that of the former."

Redmond v. Commissioners, 106 N. C., 122, 127, 128.

Therefore, if this tax be a tax on property, it is void, for the statute seeks to do that, which the highest court of the State says may not be done under the Constitution, that is first provide that no tax shall be levied against property for support of the State, (sec. 3, Rev. Act, 1921, appendix, page 82) then for support of the State levy a tax of one tenth of one per cent upon the true and actual value of the entire property, tangible and intangible as assessed for ad valorem taxation, of all railroad corporations in the State.

From the adoption of the present Constitution in 1868 to 1920, the legislature has at each biennial session, in obedience to the mandate of the Constitution, levied against property a tax substantially in the following form:

"There shall be levied and collected annually an ad valorem tax of eleven and two-thirds cents for State purposes, four cents for pensions and thirty-two cents for public schools, making forty-seven and two-thirds cents on every one hundred dollars value of real and personal property in this State required to be listed in 'An act to provide for the assessment of property and collection of taxes,' sub-

ject to exemption made by law." (Sec. 3, Chapter 90, P. L. 1919.)

For many years all property in North Carolina has been required to be listed annually, personal property appraised each year, real estate, including railroad property, appraised quadrennially.

In 1919 the legislature provided an elaborate organization for the appraisement of all property in the State; the State Tax Commission was given final authority as appraisors, except that this appraisement was not to become effective until adopted by the legislature.

At a special session of the legislature held in August, 1920, the State Tax Commission made its report, showing that the valuation of real estate had been increased from $506,808,394.00 to $2,006,124,977.00 or nearly 300 per cent, and railroad property from $125,417,618.00 to $250,587,158.00 or 100 per cent. (Appendix to answer p. r. p. 45-51 and statement as to railroad p. r. p. 81.)

For more than 20 years prior to August 1920, the legislature had imposed a trade tax upon railroads based on the number of miles operated and at a rate per mile based on gross earnings.

Rev. Act 1919, Sec. 77 and 78, appendix, page 78.

The legislature, at the special session in August, 1920, by Chapter 1 of the Public Laws, adopted the appraisement as made and reported to it; by section 2 thereof provided, "There shall be levied and collected for the year one thousand nine hundred twenty, for the benefit of the State public school fund an ad valorem tax of thirteen cents on every one hundred dollars value of real and personal property in this State required to be listed by the revenue laws of the State."

Thus reducing the State tax on property from the 47⅔ cents upon the one hundred dollars levied in 1919 to 13 cents for 1920.

Section 7 of the same statute first provided:

"That for the purpose of providing additional revenue for the State in lieu of ad valorem tax on property heretofore levied by the State, the following taxes shall be levied and collected in the manner now provided by law for collection of similar taxes."

Section 7, (appendix, page 80), repealed the trade tax on railroads based on number of miles, which had been in force for twenty years or therebouts, and in lieu thereof enacted section 82 (6½), supra.

At the 1920 election, the Constitution of the State was by popular vote amended so that the tax on property for State and county purposes combined (except certain special taxes) was limited to 15 cents on the one hundred dollars, and the State tax to five of this fifteen, and authorizing the taxation of incomes though derived from property taxed.

In 1921 the legislature declined to levy any tax against property for support of the State, but continued in effect section 82 (6½) as to railroads.

As will be seen, the practical effect and operation of this legislation was for 1920 to reduce the ad valorem tax of all tax payers except railroad corporations, for State and State school purposes from forty seven and two third cents to thirteen cents, and of railroad corporations to twenty three cents, and for 1921 and subsequent years to relieve all tax payers except railroad corporations from all taxes on property for State purposes and to impose a tax on railroads of ten cents on the one hundred dollars, or one tenth of one per cent on the "true and actual value of their entire property, tangible and intangible as assessed for ad valorem taxation."

This is all accomplished, if legal, by the simple expedient of calling the tax a trade tax.

It is settled law in North Carolina that "the term 'trades' in Art. V, Sec. 3, includes any employment or business embarked in for gain or profit" and that "when the word 'trades' is used in defining the power to tax, the broadest signification is given to it."

Bickett v. State Tax Commission, 177 N. C., 433, 435.
Smith v. Wilkins, 164 N. C., 135-148.
State v. Worth, 116 N. C., 1007-1011.

Bickett's case, supra says:

"It is settled that a license tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed."

And again:

"It is within the legislative power to define the different classes and to fix the license tax required of each class. All he can demand is that he shall not be taxed at a different rate from others in the same occupation, as classified by legislative enactment." (page 436.)

Therefore, if it be lawful under the State Constitution to measure a trade tax by a given per cent of the "true and actual" value of the entire amount of property owned by a tax payer as assessed for ad valorem taxation, the most unjust system of taxation is legal, under a Constitution, the very spirit of which is, as declared by the Supreme Court of the State in Redmond v. Commissioners, 106 N. C., 122, 126, fairness and equality, for as the Court there said: "No one who reads these (Art. V, Sec. 3) and other provisions of the Constitution will fail to be impressed with the earnest effort to engraft upon our organic law the great principle of equality of taxation."

If this tax be valid, a scheme of taxation can be devised by which lawyers may be taxed one per cent, doctors two per cent, grocery merchants three per cent, cotton farmers four per cent, tobacco farmers five per cent, tobacco manufacturers six per cent, etc. of the true and actual value of their entire property in the State, for every business is a trade and may be taxed at any rate, at the will of the legislature.

The defendants, in their answer, contend that this is a tax upon the trade of carrying on intrastate commerce, admitted that it is measured by a given per cent of the true value and

actual values of plaintiff's entire property, tangible and intangible as assessed for ad valorem taxation, and contend that this is a valid tax.

In the Court below, they cited and relied on Maggoun v. Illinois Trust Bank, 170 U. S., 283 and Keeney v. New York, 222 U. S. 525, and numerous other cases sustaining the principles decided in those two cases.

Those cases involved the validity of inheritance, transfer or succession taxes.

Defendant's counsel either overlooked or ignored the decision of the highest court of the State of North Carolina, in Pullen v. Commissioners, 66 N. C., 361, 364, where it was expressly held that an inheritance, succession or transfer tax was neither a tax upon property nor a tax upon trades, professions, franchises or incomes, as those terms are used in the State Constitution. They overlooked what this Court says in the Magoun case, to wit:

> "1. An inheritance tax is not one on property, but one on succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right, a privilege, and therefore the authority which confers it may impose conditions upon its use."

The case at bar deals with a tax on a trade or business under Article V, Section 3 of the State Constitution.

Defendants, in the court below, cited St. Louis, S. W. Ry. Co. v. Arkansas, 235 U. S., 350, 371, where the court upheld a statute which imposed an annual tax of one-twentieth of one per cent *upon the proportion of capital stock of the corporation represented by property owned and used in business transacted in the State as* license tax for the privilege of doing business.

The statute was attacked upon the ground that it was a regulation of and burden on interstate commerce. The Court said:

> "The act in question seems to have been drawn with great care and with the evident purpose to exclude any contention

that the tax was made upon interstate commerce . . . We therefore accept the construction of act No. 113 that we have quoted from the opinion of the State court, which is, in short, that it impose an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the State, the amount of the tax being fixed solely by reference to the property of the corporation that is within the State and used in business transacted within the State, and excluding any imposition upon or interference with interstate commerce. . . . And we proceed to consider whether, in view of the construction thus placed upon act No. 112, the franchise tax imposed upon plaintiff in error pursuant to its terms runs counter to the commerce clause or the 14th Amendment." (p. 262, 263).

And on page 364 quoted the following from the opinion of Mr. Chief Justice Fuller in Postal Tel. Cable Co. v. Adams, 155 U. S., 688:

"But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its privilege within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (THE EXACTION, THEREFORE, NOT BEING SUSCEPTIBLE OF EXCEEDING THE SUM WHICH MIGHT BE LEVIABLE DIRECTLY THEREON)" (Capitals supplied.)

That is if the tax be in truth and in fact a tax upon property, calling it a trade or license tax will not make it unlawful because as a property tax it is subject to all the limitations of taxes on other property.

In the case at bar, the tax is in truth and fact a property tax, and as such void under the constitution. The defendants seek to evade the Constitution by calling it a trade tax.

Looking at the substance, not the shadow, as the Court said, this cannot be done.

In the case at bar, as in the case of Dawson v. Kentucky Distilling Company, 255 U. S., 288-298, the statute in question has not been passed on by the State courts. In the case at bar it can never be, because the statute has been amended and if the injunction be denied, the tax will be collected and no suit can be brought to recover it back.

In the Dawson case, supra, the Court says:

> "But the validity of the statute does not appear to have been passed upon by any Kentucky Court. We are, therefore, called upon, as were the District Courts, to determine this question of State law. The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents."

The incidents of the tax are:

1. It is ad valorem, that is, it is measured by the amount of property owned by the tax payer.

2. The amount of the tax is dependent upon an appraisal by assessors of the value of the property of the tax payer.

3. It is payable to the State Treasurer, just as all taxes paid by railroad companies, for the support of the State have been paid for twenty years past, whether called trade or property taxes (see Sec. 50, Chapt. 7, Public Laws, 1901), which as to this provides:

> "All taxes due the State from any railroad company shall be paid by the treasurer of each company directly to the State Treasurer within thirty days after the 1st day of July of each year."

This provision continued in the law so long as any tax was levied upon property for support of the State.

4. It has no relation to the amount of business done, or the extent to which it uses its trade, the only reference to the nature of the business being to designate who shall pay the tax.

5. It was originally imposed by a statute which declared that it was in lieu of another tax levied for the same purpose, payable to the same state officer, measured exactly in the same way, and upon an appraisal made by the same officers.

Testing the tax at bar by its incidents and applying to these incidents the principles of law laid down for distinguishing the two classes of taxes, we submit that this is a property tax.

The true test or distinction between an excise or trades tax and a property tax is laid down in Ruling Case Law, Vol. 26, Sec. 19, page 35, as follows:

> "An excise and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted of laying them and fixing their amounts. If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise; but if the tax is computed upon a valuation of property, and assessed by assessors either where it is situated or at the owner's domicile, although privileges may be included in the valuation, it is considered a property tax."

This definition is in line with the decisions of the courts:

Worth v. R. R., 89 N. C., 301, 306, where the Court says:

> "Whenever a tax, as here, is imposed upon a corporation directly by the legislature, and is not assessed by assessors, and the amount depends on the amount of business transacted by the corporation, and the extent to which it has exercised the privileges granted in its charter, without reference to the values of its property or the nature of the investments made of it, it is a franchise tax Burrougs Tax, 169. To the same effect is *Attorney General v. Bank of Charlotte,* 4 Jones Eq. 287 (57 N. C.)"

These decisions of the courts of North Carolina are in line with the decisions of this Court, notably the leading case of *Provident Savings Inst. v. Massachusetts,* 6 Wall. 611, where the tax attacked was upon institutions for savings incorporated under the laws of Massachusetts, was three fourths of one per cent per annum on the amount of their deposits. The ground of attack was that it was a tax upon property. At to that, the Court, on pages 631-2 said:

> "Franchise taxes are levied directly by an act of the legislature, and the corporations are required to pay the amount in to the State treasurery. This differs from property taxes, as levied for state and municipal purposes, in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection, and they are in lieu of all other taxation, state or municipal. Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a franchise tax depends upon the business transacted by the corporation and the extent to which they have exercised the privileges granted in their charter. Unlike as the two systems are in every particular, it seems to be a work of superogation to point out the differences, which are radical and substantial."

Commonwealth v. Hamilton Mfg. Co., 12 Allen (Mass.) 300, (affirmed on writ of error *Hamilton v. Commonwealth,* 6 Wall. 632) C. J. Bigelow, as to a tax assessed against the company upon the market value of its capital stock over and above the value of its real estate, for the Court, said:

> "It certainly can not be contended that the legislature can legitimately impose a tax on property in the name or under the guise of levying an excise or duty. Such legislation would be a palpable evasion of a distinct and clearly defined constitutional restriction, and would substitute an unequal and arbitrary system of taxation upon property for one which was intended by the constitution to be equal

and proportionate. If the practical operation and effect of an assessment authorized by an act of the legislature would be to levy a tax on the property of certain individuals or corporations from which all others were exempt, so as to throw on a particular class a disproportionate share of the burdens of raising money for public purposes, without any equivalent benefit, it would be the duty of the Court to declare it to be an unauthorized act of legislative power, irrespective of the particular form in which the assessment or tax might be imposed. The validity of the act would depend on the substantial nature and operation of its provisions, and not on the formal language in which they were expressed, or on the mode, in which they were to be carried into effect. . . . . Looking at the material provisions of the act by virtue of which the assessment in controversy is imposed in the light of these familiar principles, we cannot say that a reasonable construction of them necessarily leads to the conclusion that the assessment is in fact a tax on the property of the corporations therein designated, and not an excise or duty laid on the respective franchises. It certainly is not in terms imposed on the corporate property, nor do we think it is so in effect or substance. The statute does not require that there should be any return made of the personal property held by the corporation to the board of commissioners, who are to fix the amount on which the assessment is to be reckoned, nor is there any valuation or estimate of such property to be made in order to arrive at the excise or duty. The market value of all the capital stock of each corportion, after deducting the real estate and machinery, if any, belonging to it, is the prescribed basis on which the calculation is to be made, and by which the excise is to be ascertained, on which the assessment is laid. *If the legislature had intended to impose a tax on the property of corporations, exclusive of their real estate, it would have been very easy to ascertain the exact amount liable to such assessment by requiring returns setting forth the nature and*

> *value of all personal estate of which each was possessed. There would have been a pure property tax.*" (Italics supplied.)

In *Bailey v. Fuqua,* 24 Miss., 49s, where a tax was imposed of one-fourth of one per cent on all bank stock subscribed for in any incorporated bank in the state, the court held the tax invalid, saying:

> "The term 'ad valorem tax' is as well defined and fixed as any other used in political economy or legislation, and simply means a tax or duty upon the value of the article or thing subject to taxation. The language used by the legislature in this law should receive the same construction as if it had declared that 'there shall be assessed and collected within this State a tax of one-fourth of one per cent on the value of all bank stock subscribed for in any incorporated bank, etc.' Had this language been used no doubt would have arised in the mind of anyone."

This was the exact language used in the case at bar.

In *Pingree, Governor v. Auditor General,* 120 Mich., 95, the statute authorized certain state officers to assess telegraph and telephone lines in the state at their true cash value, and levy a tax upon such assessment at a rate equal to the average rate of taxes (general, municipal and local) levied throughout the state for that year. The tax was paid. The auditor treated it as an exise or franchise tax, and credited it to the school fund. The Governor brought mandamus to have the tax credited to the general fund where property taxes belonged. A suit was brought by a telephone company to have the tax declared illegal as violating the uniformity clause of the State constitution. The court held it to be a property tax and as such void.

We respectfully submit that the tax is one on property and as such void under the State Constitution.

IF THE TAX BE A TAX LEVIED FOR THE PRIVILEGE OF CARRYING ON THE TRADE OR BUSINESS

OF OPERATING A RAILROAD, THEN IT IS A TAX AND DIRECT BURDEN UPON INTERSTATE COMMERCE AND AS SUCH VOID AS IN CONFLICT WITH ARTICLE I, SEC. 8, CLAUSE 3 OF THE FEDERAL CONSTITUTION.

It is as well settled as any proposition of law can be, that under the Federal Constitution a State may not impose a tax for the privilege of carrying on the trade or business of an interstate carier or interstate commerce.

Leloup v. Mobile, 127 U. S., 640, 648, Mr. Justice Bradley, for the Court, says:

> "In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form whether by way of duties laid on transportation of the subjects of that commerce or on the receipts derived from that transporation, or on the occupation or business of carrying it on, and the reason is that such a tax is a burden on that commerce, and amounts to a regulation of it, which belongs to Congress. This is a result of so many recent cases that citation is hardly necessary. As a matter of convenient reference we give the following list:
>
> Case of State Freight Tax, 82 U. S., (15 Wall.) 232;
> Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S., 1;
> Mobile County v. Kimbal, 102 U. S., 691;
> W. U. Tel. Co. v. Texas, 105 U. S., 460;
> Moran v. New Orleans, 112 U. S., 69;
> Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196;
> Brown v. Houston, Id. 622;
> Walling v. Michigan, 116 U. S., 446;
> Pickard v. Pullman Southern Car Co., 117 U. S., 34;
> Wabash, St. L. & P. R. R., Co. v. Illinois, 118 U. S., 557;

Robbins v. Shelby County Taxing Dist., 120 U. S., 489;
Philadelphia & S. M. Steamship Co. v. Pennsylvania, 122 U. S., 326;
W. U. Tel. Co. v. Pendleton, Id., 347;
Ratterman v. W. U. Tel. Co., 127 U. S., 411."

So in *Atlantic & Pacific Telegraph Company v. Philadelphia*, 190 U. S., 160, 163, where the Court says:

"The question presented is as to the validity of the charges imposed by the ordinances of the City of Philadelphia upon the defendant (plaintiff in error) a corporation engaged in interstate commerce. Few questions are more important or have been more embarrassing than those arising from the efforts of a State or its municipalities to increase their revenue by exactions from corporations engaged in carrying on interstate commerce. There have been many cases in whose decisions some propositions have been adjudicated so often as to be no longer open to discussion.

First. . . . . The Constitution of the United States having given to Congress the power to regulate commerce not only with foreign nations, but among the several states, that power is necessarily exclusive, whenever the subjects of it are national in their character or admit only of one uniform system or plan of regulation.

Second. No state can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce."

We omit the numerous decisions cited by the court in support of each proposition.

This rule of law has been reaffirmed many times since.

Askren v. Continental Oil Co., 252 U. S., 444, where a tax of $50 a year for purchasing, shippingg and selling gasoline was held invalid, citing:

Standard Oil Co. v. Graves, 249 U. S., 389;
Western Union Tel. Co. v. Kansas, 216 U. S., 1;
Pullman Company v. Kansas, 216 U. S., 56;
International Text Book Co., v. Petterson, 218 U. S., 664;
A. T. & S. F. R. R., Co. v. O'Connor, 223 U. S., 280;
Williams v. Talledega 226 U. S., 404.

Therefore we submit, the only real question for consideration is: Does the statute impose a tax upon plaintiff for carrying or doing the business of interstate commerce?

The defendants in their answer seem to concur in this view of the law, for they expressly aver that the tax is one imposed, not for the privilege of doing interstate commerce, but for doing intrastate commerce. See p. r. page 42, Sec. 28 of Answer. And in their brief filed in the court below on page 48, we find this statement:

> "Thus, as was shown in *Osborne v. Florida,* (164 U. S., 650), the State cannot require the payment of a privilege or franchise tax as a condition precedent to the right of a carrier to do any kind of business in the State, for such a requirement would, if valid, stop interstate commerce as well as intrastate commerce."

May the court, under the recognized rules for construing statutes, limit the tax, as defendants contend should be done, to the trade of doing intrastate commerce?

We submit not.

The language of the statute, so far as material to this question is:

> "Every railroad company doing business in this State shall annually on or before the thirtieth day of July, make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission, and giving such information as the State Tax Commission shall require for the purpose of carrying out this section. . . . The franchise tax of each such rail-

road company for the privilege of exercising its franchise in this State shall be one-tenth of one per cent of the value so ascertained . . . ."

As a matter of legislative construction of the term "doing business in the State," (and that, without qualification it includes both inter and intrastate commerce, when both are conducted by a common carrier) we refer to Section 79 (a) of the same schedule of the same statute, where the language is:

"Each express company doing business in this State shall pay to the State Treasurer, an annual privilege or license tax, as follows: . . . ."

"Provided further, that nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce, or upon any business transacted for the Federal Government."

For full text see page 84 of appendix.

Again, Section 80 of the same act:

"Each and every person, firm, or corporation operating within this State the apparatus necessary to communication by telegraph shall pay, for the privilege of engaging in such business, to the State an annual license tax of five dollars per mile for each pole mile . . . . Provided that nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce or upon any business transacted for the Federal Government."

For full text, see page 80 of appendix.

When this suit was started, the Legislature, recognizing that under the decisions, and under the legislative intent, a tax had been imposed for the privilege of doing interstate commerce, amended the act so as to make it specifically apply to intrastate commerce alone.

Illinois Central R. Co. v. Mississippi R. R. Co., 229 Fed. Rep., 248, cited by defendant in their printed brief in the court

below to support this tax, well illustrates the situation. There the statute under attack read:

"That Section 3850 of Chapter 114 of the Code of 1906 levying privilege taxes on railroads be and is hereby amended so that for the purpose of levying a privilege tax on railroads, such railroads are divided into five classes . . . And any person, natural or artificial, who shall exercise any of the privileges taxed herein, without first paying the tax and procuring the tax or license, as required by law, shall be subject to the pains and penalties imposed, etc."

The Court, on page 253, said:

"The privilege taxed by the act is the business of operating a railroad. Any person or corporation who exercises this privilege, without first paying the tax and procuring the license, is subjected to the prescribed penalties. There is no restriction as to the character of business taxed to be deducted from the language of the act. The operation of a railroad by any one and for any purpose is inhibited until the tax is paid and the license secured. Any one who exercises the privilege of operating a railroad for any purpose, without first paying the tax and procuring the license, is liable to the penalties prescribed. The language of the act is inclusive enough to prohibit the operation of a railroad engaged in exclusively interstate commerce. The Supreme Court of Mississippi has not as yet construed the act, so as to make its provisions inapplicable to interstate commerce or government business. If its language contained sufficient ambiguity to admit of such a construction, in order that the act might prevail, rather than be destroyed, it should be so construed. The language of the act, however, is general in its terms, contains no exception, and is not ambiguous. This being true, and in the absence of authoritative construction by the Supreme Court of Mississippi, it must be given construction consistent with its language."

That the term "every railroad company doing business in this State" includes all the business done and usually done by railroads, and where the business actually done is both inter and intrastate, includes both classes of business, unless there is something to restrict this general language, would seem to be conclusively settled.

In *Leloup v. Mobile*, 127 U. S., 640, 642, the language of the statute was:

> "Be it ordained by the Mobile Police Board, that the license tax for the year, from the 15th of March, 1883, to the 15th of March, 1884, be and the same is hereby fixed as follows:
>
> "Telegraph Companies $225 . . .
>
> "Be it further ordained that for each and every violation of the aforesaid ordinance, the person convicted thereof shall be fined by the recorder not less than fifty dollars."

The Supreme Court of the State upheld the tax on writ of error; the judgment was reversed, this Court saying:

> "In approaching the question thus presented, it is proper to notice that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama in force at the time this tax was imposed, the telegraph company was required, in addition, to pay taxes to the State, County and Port of Mobile, on its poles, wires, fixtures and other property, at the same rate and to the same extent as other corporations and individuals were required to do."

The tax was held to be a tax on interstate commerce and invalid, and replying to the argument that the company was doing intrastate commerce, and the State had the right to tax that business, the Court, on page 647, said:

> "But it is urged that a portion of the telegraph company's business is internal to the State of Alabama and therefore taxable by the State. But that fact does not

remove the difficulty. The tax affects the whole business without discrimination."

Allen v. Pullman Co., 191 U. S., 171, 179, where the tax was:

> "That the rate of taxation on the following privileges shall be as follows: Sleeping Cars: Each company doing business in the State, on each car, per annum, $500."
>
> Section eight of the act provided:
>
> "That any and all parties, firms or corporations exercising any of the foregoing privileges must pay this tax, as set forth in the act, for the exercise of such privilege, whether they make a business of it or not."

The State Auditor sought to limit the scope of this act to cars running between Nashville and Memphis, and between Memphis and Chattanooga, purely intrastate. The Court said:

> "But this action does not conclude the State in taxing for other years, and the action taken by the comptroller does not limit the terms of the law affecting interstate commerce . . .
>
> "We are not at liberty to read into the statute terms not found therein, or necessarily implied, with a view of limiting the tax to local business, which the Legislature in the terms of the act impose upon the entire business of the company. We are of opinion that taxes enacted under the act of 1887 are void as an attempt by the state to impose a burden upon interstate commerce."

The principle of construction contended for by the plaintiff is well illustrated in the case of *Singer Sewing Machine Co. v. Georgia*, 233 U. S., 304-318. The statute provided:

> "Sewing Machines—Each person, firm or corporation selling or delivering sewing machines, either in person or through agents, shall pay $50.00 annually for each county in which they may sell or deliver said articles."

Plaintiff had established regular places of business in thirty-six counties in the State of Georgia; in all but one, Russell County, plaintiff was conducting a purely intrastate business; in Russell County plaintiff was carrying on both inter and intrastate commerce. Plaintiff sought to enjoin the collection of the tax in all thirty-six counties. The District Court denied the injunction as to all the counties but Russell, where the business was both inter and intrastate, and granted the injunction in that county upon the ground that the tax burdened interstate commerce. This Court, affirming the judgment, said:

> "With respect to business conducted in Russell County, the decree of the District Court is not now directly under review, but at any rate it was clearly correct under *Crenshaw v. Arkansas*, 227 U. S., 389. With respect to the other counties, the correctness of the decision, so far as the commerce clause is concerned, seems to us equally clear under *Emert v. Missouri*, 156 U. S., 296."

In that case, where the same corporation was conducting the same kind of business to two or more places, at one place the business being purely local or intrastate, the statute was held valid; at another place the business being both inter and intrastate, the statute was held as to the business done in that place invalid the court holding that the statute applied to the business as it was actually carried on, and further holding that if the business as actually carried on consisted of both intra and interstate commerce, the language being broad enough to cover both, the court was without power to separate the two.

The court cited *United States v. Reese*, 92 U. S., 214, 221, holding a penal statute void, which was couched in language broad enough to cover wrongful acts without, as well as within the constitutional inhibition, upon the ground, that the court could not reject the unconstitutional part and retain the constitutional; also *Trade Mark Cases*, 100 U. S., 82, 99 and *Lehoup v. Mobile*, 127 U. S., 640.

The court also cited *Norfolk & Western R. Co. v. Pennsylvania*, 136 U. S., 114, 119; *Crutcher v. Kentucky*, 141 U. S., 47, 62; *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S., 217; *Western Union Tel. Co. v. Kansas*, 216 U. S., 1; *Williams v. Talladega*, 226 U. S., 404, 419, saying:

> "There was a state license tax that operated without exemption or distinction upon the privilege of carrying on a business, a part of which was that of an essential governmental agency, constituted under the laws of the United States. It was held that the tax necessarily included within its operation this part of the business and since this was unconstitutional, the whole was void."

It is therefore respectfully submitted that the language of the act is broad enough to and does cover the entire business of operating a railroad in the State, a large part of which is interstate commerce, and the court is not at liberty to reject the interstate part and apply the tax solely to the intrastate part of the business.

THE STATUTE MAKES THE PAYMENT OF THE TAX AND OBTAINING THE LICENSE A CONDITION PRECEDENT TO DOING NOT ONLY INTRASTATE BUSINESS, BUT INTERSTATE BUSINESS.

Section 82 (11) of the Revenue Act, provides:

> "Upon the payment of the tax or fee provided for in this act to the Treasurer of State, the Treasurer of State shall make out and deliver to the public utility or corporation so paying a receipt for the payment by such utility or corporation of the tax or fee herein provided for."

Section 82 (17) of the Revenue Act, provides:

> "If a corporation, wherever organized, required by the provisions of this act to file any report or return or to pay any tax or fee, either as a public utility or as a corporation, organized under the laws of this State, or as a foreign corporation for profit doing business in this

State and owning and using a part or all of its capital or plant in this State, or as a sleeping-car, freight line, or equipment company, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the Commission shall certify such fact to the Secretary of State. The Secretary of State shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this State by appropriate entry upon the margin of the record thereof, or cancel the certificate of authority of any such foreign corporation to do business in this State, by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporation by such articles of incorporation or by such certificate of authority shall cease and determine. The Secretary of State shall immediately notify such domestic or foreign corporation of the action taken by him."

Under this section it is clear that the payment of the tax is made a condition precedent to the right of the corporation to do any business.

That a railroad company may not be established or operate in the State without first obtaining authority so to do is beyond question.

Consolidated Statutes, Sec. 3413, provides:

"If any person or corporation, not being expressly authorized thereto, shall make or establish any canal, turnpike, tramroad, railroad or plankroad, with the intent that the same shall be used to transport passengers other than such persons, or the members of such corporation, or to transport any productions, fabrics or manufactures other than their own, the person or corporation so offending, and using the same for any such purpose, shall forfeit and pay fifty dollars for every person and article of produce so transported.

"This section shall not apply to any narrow-gauge rail-

road, tramroad or toll road made and established and maintained solely by the owner of the lands upon which said road may be, the principal business of which is the transportation of logs, lumber and articles for the owners of such railroad or tramroad: Provided, that the corporation commission shall have power to authorize lumber companies having logging roads, to transport all kinds of commodities other than their own and passengers and to charge therefor reasonable rates to be approved by said commission."

So that the statutes of the State, in order that a railroad may be constructed or operated, require:

(1) Authority to construct and operate, and imposes pains and penalties for failure to obtain such authority.

(2) For operating or doing business, an annual tax of one-tenth of one per cent of the ad valorem value of its entire property in the State.

(3) Which is exacted as a license tax for carrying on the trade of operating a railroad, and

(4) If the tax be not paid the authority which has been granted is cancelled and annulled.

Plaintiff is engaged in both inter and intrastate commerce.

Under the decisions above cited, we submit that the statute imposes a tax, which as a trade tax directly burdens interstate commerce, and as such is void, under the commerce clause of the Federal Constitution.

The defendants, in the court below, contended that the court was at liberty to limit the words of the statute to a license for doing intrastate business alone, and cited and relied upon:

U. S. v. Singer, 15 Wall., 111 (United States Distillers Tax).

Maine v. Grand Trunk Railway Company, 142 U. S., 217.

That case was decided upon the idea that the tax levied, in lieu of all other taxes, was valid as a property tax, as it

amounted to no more than a fair tax upon property, the court holding that it would disregard the name given the tax (the shadow) and look at the substance.

As to this case, in *Meyers v. Wells Fargo Co.*, 223 U. S., 298, 302, Mr. Justice Holmes, for the court, said:

> "The tax is 'in addition to the taxes levied and collected upon an ad valorem basis.' . . .
>
> "Therefore this tax cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way. It would be difficult to apply to a tax levied in these days the explanation of *Maine v. Grand Trunk R. Co.*, 142 U. S., 217, given in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S., 217, 226; *Flint v. Stone Tracy Co.*, 220 U. S., 107, 162-165, and to suppose it intended to reach only the additional value given by its being part of a going concern to property already taxed in its separate items."

As a property tax, as shown, the statute is in conflict with the State Constitution.

Osborne v. Florida, 164 U. S., 650, where the State court had construed the State Statute and held that it did not apply to interstate commerce, but was limited solely to a tax upon intrastate commerce.

Defendant relied principally in the court below on *St. Louis, Southwestern R. R. Co. v. Arkansas*, 235 U. S., 350. In that case the State court had held that the statute related solely to intrastate business, using this language:

> "The act in question seems to have been drawn with great care and with the evident purpose to exclude any contention that the tax was made upon interstate commerce. The framers of the act evidently considered the cases of *Ludwig v. Western Union Tel. Co.*, 216 U. S., 146, and *Western Union Tel. Co. v. Kansas*, 216 U. S., 1, and therefore intended to pass an act that would not be contrary to the principles therein announced."

Which was quoted by this Court, see page 362, this Court said:

> "Upon the mere question of construction, we are of course concluded by the decisions of the State Court of last resort."

Therefore, it is apparent that the tax there was as much limited to the domestic commerce of the State, as if the statute so declared.

The Statute under consideration in that case contained the following provision:

> "In case any corporation shall fail to pay the franchise tax prescribed by this Act when it becomes due during the terms of said certificate, the said tax commission shall cancel said certificate, and said corporation shall forfeit its right to do business in this State, in addition to the other penalties prescribed in the act."

This Court held that if this language, needs must be construed, to mean that if the tax was not paid, the right to do interstate business was cancelled, then the whole statute would be void, as a burden upon interstate commerce. (P. 368 of opinion.) But in view of the construction given to the statute by he State court, that it only applied to intrastate commerce, this court would not assume that the State court would hold, that the right to do inerstate business was forfeited, for failure to pay a license tax to do intrastate commerce. P. 369 of opinion).

An examination of the two cases cited by the Supreme Court of Arkansas, as setting out the principles of law which the Legislature intended to be avoided in passing the statute under consideration in the *St. Louis, Southwestern R. R. Co., case, supra,* shows:

In *Ludwig v. Western Union,* 216 U. S., 146, that the language of the statute in that case, as here, was:

> Sec. 1 "Every company or corporation incorporated under the laws of any other state, etc. . . . *now or*

hereafter doing business in this State, shall file in the office of the Secretary of State a copy of its charter, etc.

Sec. 2. "Any foreign corporation *which shall fail to comply with the provisions of this act,* and shall do *any* business in this State, shall be subject to a fine of not less than $1,000.00, . . . and as an additional penalty any foreign state corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, cannot make *any contract in this State which can be enforced by it either in law or in equity.*

Sec. 3. "That all corporations hereafter incorporated in this State, *and all foreign corporations seeking to do business in this State,* shall pay into the treasury of the State *for the filing of said articles,* a fee of $25.00 where the capital stock is $50,000 or under." (Italics court's.)

In *Western Union Tel. Co. v. Kansas,* 216 U. S., 1, the court, as to the statute under consideration, said:

"Under those statutes a State Charter Board was organized and its powers defined. That Board was authorized to receive applications from corporations of other states, territories or countries, seeking permission to engage in business as foreign corporations in Kansas."

Then the court sets out the details of the legislation and says:

"Then comes these important sections:

"Each corporaation which has received authority from the Charter Board to organize, shall, before filing its charter with the Secretary of State, as provided by law, pay to the State Treasurer of Kansas *for the benefit of the permanent school fund* a charter fee of *one-tenth of one per cent of its authorized capital* upon the first $100,000 *of its capital stock or any part thereof,* etc. . . . All the provisions of this act, including the payment of fees herein provided shall apply to *foreign* corporations seeking to do business in this State . . ."

By another section corporations operated for profit except banks, insurance and railroad corporations were required to file reports showing certain facts required by the statute, and

> "Such failure to file such statements by any corporation doing business in this State, and *not organized under the laws of this State,* shall work a forfeiture of its right or authority to do business in this State, and the charter board may at any time declare such forfeiture and shall forthwith publish such declaration in the official state papers." (Italics court's).

In both of those cases the statute in question had been held void, as a burden upon interstate commerce, and the contention was made in both, that the statute applied only to local business. This court did not take that view of the statute.

Comparing the statute in those two cases, to the statute at bar, we find in the case at bar, that no railroad company may transport any passengers or commodities in the State, without first obtaining authority to so do, under pain of $50.00 for each passsenger or article transported. Consolidated Statutes, Sec. 3413. That unless, every railroad company doing business in the State, shall pay an annual license tax of one-tenth of one per cent of the value of its entire property in the State, the Secretary of State is required, or authorized to cancel its charter and revoke its authority to do business. Revenue Act, Sec. 82 (6½) and (17). Just exactly the same condition as existed in the two cases, which the Supreme Court of Arkansas held, that the statute in the *St. Louis, Southwestern case,* had been carefully drawn to avoid.

It will be clearly seen that the *St. Louis, Southwestern case* is not an authority against plaintiff in this case.

THE TRANSPORTATION ACT OF 1920, AMENDING THE INTERSTATE COMMERCE ACT, MATERIALLY CHANGED THE STATUS OF INTERSTATE CARRIERS.

The Interstate Commerce Act, Sec. 1 (18) as amended by the Transportation Act of 1920, provides:

> "No carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment"

This part of the act was considered by this court in *Texas v. The Eastern Texas Railroad Co.*, 42 S. C. Rep., 281. Decided March 13, 1922.

The Eastern Texas Railroad Company, a Texas corporation, owned a line of railroad in that State, 30.3 miles, originally constructed as a lumber road, not owning or operating any other railroad; the corporation made application under the act for leave to abandon, which was granted. The State of Texas brought suit to enjoin the abandonment of the operation of the road in intrastate commerce. This court said:

> "If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their validity will be unavoidable. If they be given a more restricted construction their validity will be undoubted."

The court then holds that following the settled construction of the Interstate Commerce Act, that the act as a whole, including the amendments, only applies to intrastate commerce as it affects interstate commerce and says:

> "These considerations persuade us that the paragraphs in question should be interpreted to read as not clothing the Commission with authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business."

Here we present the other side, may an interstate carrier

abandon its intrastate business without a certificate of convenience from the Commission.

We submit that the power and authority of Congress to require a common carrier by railroad, engaged in interstate commerce, to also conduct and carry on intrastate commerce, cannot well be denied under the decisions.

Congress is empowered, in order to regulate—that is provide the law for the government of interstate commerce, to enact "all appropriate legislation for its protection and advancement." The *Daniel Ball,* 10 Wall., 557-564: To adopt measures "to promote its growth and insure its safety." *Mobile County v. Kimbal,* 102 U. S., 691, 695: To require intrastate rates to be increased in order to remove a discrimination against interstate rates. *Houston E. & W. T. R. Co. v. U. S.,* 234 U. S., 342, 366. Under the Interstate Clause of the Federal Constitution all of the vast property and every right of a carrier (by railroad engaged in interstate commerce) became subject to the authority to regulate possessed by Congress, to the extent that regulation may be exerted, considering the subject regulated, and what is appropriate and relevant. *Wilson v. New,* 243 U. S., 332, 389.

Railroad Commission v. Chicago, Burlington & Quincy R. R. Co. (Wisconsin Rate Case), 42 S. C. Rep., 232. Decided February 27, 1922. The court says:

> "Effective control of the one (interstate commerce) must embrace some control over the other (intrastate commerce), in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete, effective control over interstate commerce, without incidental regulation of intrastate com-

merce, such incidental regulation is not an invasion of State authority, or a violation of the proviso."

And again:

"Congress, in its control of its interstate commerce system, is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensating return for all the work it does. The States are seeking to use the system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it, unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress, as the dominant controller of interstate commerce, may, therefore, restrain undue limitations of the earning power of the interstate commerce system, in doing State work. The affirmative power of Congress in developing interstate commerce is clear. . . . In such development it can impose and reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable . This is because of the supremacy of the national power in this field."

Congress has ordered plaintiff's property to be valued, has fixed a scale of rates for service rendered, which will enable it to earn a fixed rate of return on this valuation, if it can; has fixed a scale of reasonable wages to be paid for services secured to carry on business; requires plaintiff to divide with it all it earns over a fixed rate of return, and denies to the States the right to discriminate in intrastate rates as against interstate rates.

The language of the act is broad enough to cover intrastate operation, for it says "may not desist from operating the road."

That Congress may require an interstate carrier, in order to make full use of its interstate facilities to engage in intrastate commerce would not seem open to question if Congress may adopt measures "to promote its growth and insure its safety." The right undoubtedly exists.

If Congress has not by the Interstate Commerce Act, as amended, compelled plaintiff to engage in intrastate commerce, the State of North Carolina, like the State of Texas, makes it compulsory upon plaintiff, under fear of pains and penalties, to refuse to conduct and carry on intrastate commerce.

In *Railroad v. Brunswick,* 72 N. C., 10-14, the Supreme Court of the State says:

> "It may be doubted whether a railroad company having accepted privileges under its charter, would have the right, upon finding it unprofitable to tear it up and deprive the public of its use."

Under the statutes of the State, Consolidated Statutes, Sec. 3515, page 75 appendix, as construed by the State, require every railroad company operating in the State to receive all freight tendered and to transport the same within the time fixed by the statute.

Reid v. R. R., 149 N. C., 423 (S. C. 153 N. C., 490), reversed as to interstate business, by this court, in *Southern Railway Company v. Reid,* 222 U. S., 424, the statute was held void as to interstate commerce.

The business of operating the railroad in intrastate commerce, being one which is required to be done, and which plaintiff is not at liberty to abandon without the consent of the government, either Federal or State, or both, is not subject to an excise or trades tax for carrying on the business.

Pullman Company v. Adams, 189 U. S., 420, 422, where the court says:

> "If the clause in the State Constitution referred to were held to impose the obligations supposed (that is that the company could not abandon the business) and to be valid, we assume without discussion that the tax would be invalid."

Allen v. Pullman Co., 191 U. S., 171 is to the same effect.

That the State may not tax a common carrier for exercising a franchise granted by the Federal Government is

settled by *California v. Central Pacific R. R. Co.*, 127 U. S., 41.

That the doing of that which the Federal Government authorizes to be done is a franchise from the Federal Government would seem not to admit of debate.

SECTION 82 (6½) IS CONTROLLED BY SECTION 82 (3½) AND AS THUS CONTROLLED VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Section 82 (3½) makes applicable to the trades or franchise taxes imposed under section 82 of the Revenue Law, the same principle of taxation that is imposed upon manufacturers of automobiles by section 72 of the same statute.

That is that where the amount of property listed for taxation by a corporation is twice the amount, or more, than its capital stock, then the trade tax is only one-half what it is in the event that the amount of property listed is less than twice the amount of the capital sock, or if a corporation does business in two or more states the measure is the amount of property listed in North Carolina, as compared with a proportion of its capital stock based on the amount of property in the State compared with that outside of the State.

This method of taxation was held void in *Bethlehem Motor Co. v. Flynt*, 256 U. S., 421, 427.

We are content to rest this phase of the case upon the authority of that case as controlling.

The defendants:

> "Deny that section 82 (3½) of the Revenue Act has any application to railroads, or to the franchise or privilege tax on railroads; it is a section which was enacted in 1920 and was specifically limited in its application to taxes on corporations as levied in Section 82 of the Revenue Act of 1919; railroads and the franchise taxes thereon were not included in any part of the said Section 82 of the Revenue Act of 1919; when Section 82 (6½) was inserted

in that section in 1920, thus shifting the provision for franchise tax on railroads to this position as a sub-section of the said Section 82 from its former position as Sections 77 and 78 of the said statute, it was not intended to make the said Section 82 (3½) applicable to the said Section 82 (6½)." Answer, Sec. 31, p. r. p. 43.

An examination of the Revenue Act of 1920 (Section 7, which deals with this matter, appears in full, Appendix, page 80) discloses that:

1. The Legislature repealed Sections 77 and 78 of the Revenue Act of 1919, imposing a franchise tax on railroads.

2. It amended Section 82 (9) of the Revenue Act of 1919, which in express terms excepted railroad companies from the provisions of Section 82, by striking out the word "railroad" from the exempting clause, and made the new statute imposing the franchise tax a part of Section 82. See Section 7 and 7d Revenue Act of 1920. (Appendix, page 80).

We submit that where a statute, which prior to its amendment, by express words, exempts railroad companies from its provisions, is amended by striking out the exemption, and also by inserting a new sub-section as part of the old section, which new sub-section specifically applies to railroads alone, that it needs no argument to show the legislative intent to be that railroad companies become subject to the section.

THE TAX BEING VOID AS CONFLICTING WITH EITHER THE STATE OR FEDERAL CONSTITUTION, PLAINTIFF IS ENTITLED TO AN INJUNCTION TO PREVENT ITS COLLECTION.

This tax, when paid, becomes a part of the general funds of the State. eRvenue Act, Sec. 3, page 82 appendix.

Any claim for a refund is a claim against the State, and as such under the Constitution, the jurisdiction thereof is confined solely to the Supreme Court of the State. *Martin v. Worth,* 91 N. C., 45, 47, and under the express language of the Constitution, Article IV, Sec. 9, "its decisions shall be merely

recommendatory; no process in the nature of the execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

"The State cannot be sued except as provided in Section 9, Article IV of the Constitution." *Burton v. Furman*, 115 N. C., 166, 171.

The Treasurer may not pay out money in the treasury except on the warrant of the Auditor. *Ibid* 171. Mandamus "does not lie (against the Auditor) where judgment and discretion are to be exercised; nor to control the officer in the manner of conducting the general duties of his office." *Ibid* 169.

Plaintiff, therefore, could not pay the tax, sue to recover it back and if held illegal have execution for its money, any judgment would be merely recommendatory.

The State, having denied to plaintiff the right to pay the tax and sue to recover it back, provided a different method for testing the legality of taxes paid directly to the State, and carried into the general fund.

Consolidated Statutes, Sec. 7979, see page 75, appendix, as construed by the highest court of the State, authorizes an injunction to prevent the collection of an illegal tax.

Dawson v. Sherrod, 154 N. C., 525, 528, 529, lays down the following principles:

> "An injunction will lie to restrain the collection of taxes and to restrain the sale of property under distraint, for three reasons, to wit: (1) If the taxes or any part thereof be assessed for an illegal or unauthorized purpose. (2) If the tax itself be illegal or invalid. (3) If the assessment of the tax be illegal or invalid. Revisal, Secs. 821 and 2855. *Purnell v. Page*, 133 N. C., 125.
>
> "In the case of *Lumber Co. v. Smith*, 146 N. C., 199, which was an action brought to collect taxes on solvent credits, Justice Connor, writing the opinion of the court for an undivided bench, held that injunction is the proper remedy as against delinquent taxes illegally sought to be collected. Upon the same point see, also, *Armstrong v.*

Stedman, 190 N. C., 217; *Ins. Co. v. Stedman*, 190 N. C., 221.

"In this case the injunctive relief sought is not merely auxiliary to the principal relief demanded in the action, but is itself a main relief, for, assuredly, as to one or the other county, the tax is illegal and invalid.

"In the case of *Hyatt v. Dellart*, 140 N. C., 270, this court held that it is the general rule that the court will not dissolve an injunction where the main relief demanded in the action is injunctive.

"In *Parnell v. Page*, 193 N. C., 199, the present Chief Justice spoke for the court in these words: 'As to the other point, whether the plaintiff can maintain an injunction against the sale of his property under an illegal tax, or must pay the tax under protest and sue to recover it back, it is equally well settled that he can pursue either remedy. *Bonge Co. v. Carver*, 110 N. C., 325; *Armstrong v. Stedman*, 190 N. C., 217; *Brindley v. Smith*, 190 N. C., 224, hold that under the language of the statute injunctive relief may be invoked by a taxpayer when the tax is invalid or illegal.'"

Long v. Wallis, 210 S. E., 705 (decided by Supreme Court of North Carolina, March 8, 1927), was a suit to enjoin and restrain the collection of an income tax, under the Act of 1925. The court issued the injunction and made it permanent.

Plaintiff is a foreign corporation, has the right to resort to the Federal courts for the protection of its property.

"One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the Circuit Courts of the United States. *Case of Frederick's Will*, 60 U. S.,

503, 520; *Holland v. Challen*, 110 U. S., 15-24; *Dick v. Foraker*, 155 U. S., 404; *Bordon v. Land & River Improvement Co.*, 157 U. S., 327, 330; *Rich v. Braxton*, 158 U. S., 375, 405. But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of Federal jurisdiction. *Payne v. Hook*, 74 U. S., 425, 430; *McConaughy v. Wright*, 121 U. S., 201, 205. A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the State courts, in the same locality; that the wise policy of the Constitution gives him a choice of tribunals. *Davis v. Gary*, 83 U. S., 203, 221; *Crowley v. Northern Pacific Railroad Co.*, 159 U. S., 569, 583. So wherever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal Courts to maintain a like defense. A State cannot tie up a citizen of another state, having property rights within its territory, invaded by unauthorized acts of its own officers, to suits for redress in its own courts. *Reagan v. Farmers Loan & Trust Co.*, (No. 1) 154 U. S., 362, 391; *Mississippi Mills v. Cohn*, 150 U. S., 202, 204; *Cowles v. Mercer County*, 74 U. S., 118; *Lincoln County v. Luning*, 133 U. S., 529; *Scott v. Neeley*, 140 U. S., 106; *Chicot County v. Sherwood*, 148 U. S., 529; *Cates v. Allen*, 149 U. S., 451."

Smyth v. Ames, 169 U. S., 466, 516, 517.

Another ground for equitable relief is the removal of a cloud from the title to property.

Section 82 (12) of the eRvenue Act, page 87 of appendix, makes this tax a "first and best lien on all property of the public utility or corporation, whether such property is employed" in the business or not.

Shaffer v. Carter, 252 U. S., 37, 51, as to an income tax, held valid, which was made a lien upon all the property of the tax payer, the court said:

> "The procedure prescribed by paragraph 11 of the Income tax Law for enforcing such a tax by imposing a lien upon the taxpayer's entire property, as threatened to be put into effect against plaintiff's property, for taxes not assessed against the property itself, and not confined to the income that proceeded from the same property, is not 'due process of law,' within the requirements of the Fourteenth Amendment. For removal of a cloud upon title caused by an invalid lien imposed for a tax valid in itself, there appears to be no legal remedy. Hence, on this ground, at least, resort was properly had to equity for relief; and since a court of equity does not 'do justice by halves,' and will prevent, if possible, a multiplicity of suits, the jurisdiction extends to the disposition of all questions raised by the bill. *Camp v. Boyd*, 229 U. S., 530, 551, 552; *McGowan v. Parish*, 237 U. S., 285, 296."

Another ground of equitable relief against a threatened wrongful action is that if the law does not provide a plain and adequate remedy at law, resort may be had to courts of equity to enjoin and prevent the wrongful act, so that no person shall be left remediless in the protection of his life, liberty and property.

> "It is a settled principle of equity jurisprudence that if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit . . . Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law. *Davis v. Wakelee*, 156 U. S., 680, 688." *Union Pacific R. R. Co. v. Weld County*, 247 U. S., 282, 286, 287.

Defendants may contend that an act of the Legislature passed after this suit was brought (see appendix, page 102), which authorizes the Auditor upon the recommendation of the head

of a department receiving a tax, paid upon mistake or misapprehension of the law, to issue his warrant for the repayment thereof, when such recommendation is approved by the Attorney General of the State, affords a complete and adequate remedy.

This statute does not authorize a suit to be brought to test the validity of the tax, it does not require the head of the department to act, it has never been construed by the State court, it was in existence when *Long v. Watts, Commissioner of Revenue,* 110 S. E., 705, was brought, yet the injunction was granted, it was not passed until after this suit was brought.

Wherefore, it is respectfully submitted:

1. That the tax in question is a tax levied upon property of plaintiff within the meaning of the Constitution, Art. V, Sec. 3 and 6, was not levied by a uniform rule upon all property in the State, was levied for the support of the State, is twice the amount which the Constitution says may be levied for such purposes, is illegal and void, and the court erred in not so holding.

2. That as a tax upon or for the privilege of operating a railroad in the State, as applied to plaintiff, which is engaged in both inter and intrastate commerce, the language of the statute used in its ordinary acceptance is broad enough to and does include the business of interstate commerce, that the courts are not at liberty to restrict the language used by the Legislature, and constitutes a direct burden upon interstate commerce, and as such is in conflict with the commerce clause of the Federal Constitution, and the court below erred in failing to so hold.

3. That under Section 82 (3½) and (6½) the statute imposes a tax of twice the amount upon a railroad corporation which has property less than twice the amount of its capital stock, that it imposes upon one that has property twice the amount, or more, than its capital stock and violates the Fourteenth Amendment to the Federal Constitution and is void; that the court below erred in failing to so hold.

4. That the tax being illegal and void, the court erred in failing to hold that plaintiff was entitled to an injunction *pendente lite,* and also upon final hearing, to a permanent injunction.

PART II.

ASSESSMENT.

The assessment of plaintiff's property for taxation is the basis for the amount of plaintiff's tax, both the so called trade tax, and the admitted ad valorem tax, levied by the several local taxing districts; the validity of the assessment is attacked upon the ground, that:

(1) In assessing plaintiff's property, the assessing body did not comply with or follow the method pointed out by the Constitution and laws of the State; and,

(2) The assessing body, in violation of the due process clause of the 14th Amendment, imported values from another State into North Carolina; and,

(3) The acts of the assessing body, under the state statutes, as construed and applied by them in the assessment of plaintiff's property, violated the Uniformity Clause of both the State Constitution and the 14th Amendment to the Federal Constitution; and,

(4) The statutes of the state, as applied by the assessing officers, show a settled design to unlawfully discriminate against plaintiff and other railroad companies in violation of both the State and the Federal Constitution; and,

(5) The assessment as made is illegal and void.

(6) The plaintiff is entitled, upon the pleadings and proof, upon the final hearing, to a permanent injunction, and pending final hearing to an interlocutory injunction against the collection of taxes on the illegal assessment.

(7) The Court erred in failing to so hold.

See assignment of errors, p.r.p. 102-103.

FACTS

The Constitution of the State, Article V, Sec. 3, requires that all property in the State shall be taxed by one uniform rule; the courts of the state hold that this applies not only to the rate of taxation, but to the mode of assessment.

Worth v. R. R., 89 N. C., 301-309.

Under the system of taxation prevailing in North Carolina all taxable property is required to be listed annually, all listed personal property is appraised annually, real estate and railroad property is appraised quadrennially.

1919 was the year for the quadrennial appraisement of lands and railroad property; the Legislature, at its biennial session in 1919 continued in force for the tax year 1919 the then existing assessment, and provided an elaborate organization for the appraisal of property of all kinds. The State Tax Commission was the head of this organization.

This revaluation was not to become effective until reported to and adopted by the legislature at an extra session to be called for that purpose. Such session was held in August 1920, the report received and adopted and declared binding for the years 1920, 1921, 1922 and 1923, unless changed by law.

The legislature, at its regular biennial session held in 1921, enacted two statutes, one called the Revenue Act, imposing taxes for the support of the State, and its local subdivisions, Chapter 34, Public Laws, 1921, and the other called the Machinery Act, Chapter 38, Public Laws, 1921, providing for the listing of all taxable property, and the revaluation of all real estate, (except railroads).

Section 28 (a) of Chapter 38, Public Laws, 1921, required the Board of County Commissioners and the County Board of Appraisers of each county in the state to meet during the month of April 1921, as a county board of review, and to determine if the value of real estate as a whole in their respective counties, as then appraised for taxation, was in excess of its then fair value. It was required to find the average per centage of such

excess. This finding was to be reported to the State Tax Commission, and unless changed by it the assessed value of property in the several counties was to be reduced accordingly. (See Appendix, page 89).

More than 70, out of the 100 counties of the State, reported that the then assessed value of real estate was in excess of the fair value by percentages varying from 10 per cent to 50 per cent, and the assessed value of real estate in the several counties was reduced accordingly.

An examination of all conveyances of real estate recorded in the offices of the registers of of deeds of 98 out of the 100 counties, (where all deeds must be recorded to be valid against creditors or subsequent conveyances) between January 1st and June 30, 1921, where the consideration was $1,000.00 or more, disclosed the fact that the assessed value was 66.58 per cent of the actual sale value.

This result was obtained by listing the name of the grantor, grantee, date of conveyance, book and page where recorded, consideration and assessed value. The consideration was that named in the deed, except where the Internal Revenue Documentary Stamps showed a different consideration, then the consideration shown by the stamps was taken as the true consideration. These lists were all filed in the Court below, tabulated and the tabulation appears in the printed record, p. 67-72.

PROPERTY OF RAILROAD CORPORATIONS AND CERTAIN OTHER CLASSES OF PROPERTY IS PRIMARILY ASSESSED FOR TAXATION BY THE STATE TAX COMMISSION.

As to all that class of property which in the first instance is assessed by the Corporation Commission, the Machinery Act did not, (as it did with other real estate) require it to be reappraised, but gave the owner of such property the right to file a petition with the State Tax Commission, asking to have the appraisal reviewed.

(Sec. 28 (g) Machinery Act, Appendix, page 90).

The valuation adopted by the legislature in August 1920 increased the value of real estate as appraised for taxation from $506,808,394.00 to $2,006,124,994.00 or nearly 300 per cent, thus showing a very great prior undervaluation.

The property of the railroads in the state was increased from $125,417,618.00 to $250,587,158.00 or not quite 100 per cent.

The State Tax Commission, in its report to the legislature gave as a reason why there was not a greater increase in railroad property, that such property was already (according to common understanding) assessed at its full value, the exact language being:

> "One frequent criticism has been that the valuation of railroad properties could not be increased, it being understood that they were assessed at full value before."

MODE OF ASSESSMENT OF PROPERTY ACCORDING TO THE STATUTES OF THE STATE.

(1) *Real Estate and Tangible Personal Property.*

Are required to be valued or appraised at their true value in money. Secs. 21, 22 Chapter 38, Public Laws, 1921, Machinery Act. (Appendix page 88).

(2) Sec. 23, Chapter 38, Public Laws 1921, defines the term "true value in money" as follows:

> "The intent and purpose of the tax laws of this state is to have all property and subjects of taxation assessed at their true and actual value in money, in such manner as such property and subjects are usually sold, but not by forced sale thereof, and the words 'market value' or 'true value' whenever in the tax laws shall be held and deemed to mean what the property and subjects would bring at cash when sold in such manner as such property and subjects are usually sold.

(3) *Shares of Stock of Corporations.*

"Individual stockholders in any corporation, joint stock association, limited partnership, or company paying a tax on its capital stock, shall not be required to pay any tax on

said stock or list the same, nor shall corporations legally holding capital stock in other corporations in this State, upon which the tax has been paid by the corporations in this State, upon which the tax has been paid by the corporation issuing the same, be required to pay any tax on said stock or list the same. Nor shall any individual stockholder of any foreign corporation be required to list or pay taxes on any share of its capital stock if two-thirds in value of its entire property is situated and taxed in the State of North Carolina, or if such corporation has tangible assets within this State assessed for taxation at value exceeding the par value of the total stock owned by citizens of this state and the said corporations pays franchise tax on its entire issued and outstanding capital stock at the same rate as paid by domestic corporations." (Sec. 4, Chapter 34, Public Laws, 1921, Revenue Act).

(4) *Capital Stock of Corporations, Except those Otherwise Specially Provided For.*

Corporations report to the State Tax Commission each year their authorized capital stock, number of shares issued, par value, amount paid into the treasury on each share. amount of capital stock paid in, amount of capital stock on which dividends were declared, date of dividends declared during each year ending May 1, amount of each dividend during each year ending May 1, highest price of sales of stock between May 1 and 15-the of each year, highest price each year, and average for the year. The president or other designated officer of the corporation, upon oath, appraises the capital stock at its actual value as of May 1 of each year, which appraisal is based on or "measured by the amount of profits made either declared on dividends or carried into surplus or sinking fund."

From this valuation or appraisal is deducted:

(1) The assessed value of all real and personal property in the State owned and listed for taxation by the Corporation, and (2) The value of all shares of stock (owned by the Corporation) in other domestic corporations, paying a tax on its cap-

ital stock, and (3) The total amount actually invested (for three months or more prior to May 1st of each year) in bonds of (a) the State, (b) the United States, (c) any Federal Farm Loan or Joint Stock Land Bank; the amount left is declared to be the assessed value of the capital stock, subject to taxation. The appraisal is subject to review by the State Tax Commissioner, and from his review and findings an appeal liees to the Courts.

In the language of the defendants in another suit between the same parties, "The revenue laws of the State have identified the ownership of shares in ordinary corporations with the property itself of the corporation." Sec. 43, Chapter 38, Public Laws 1921, Appendix page 92.

(5) *Shares of stock of Banks.*

The shares of stock of banks, State and National, are listed by the bank for the shareholder, the bank pays the tax and may if it so elects deduct the tax from any dividends declared or collect from the shareholder.

The shares of stock are required to be valued at the market value of such shares on the 1st day of May of each year, and if there be no market value, then at their actual value, less or after deducting the assessed value of all real and personal property owned, listed by the bank, and investment in bonds of the State, made from the surplus of the bank, more than ninety days from the 1st day of May.

(Sec. 42, Chapter 38, Public Laws, 1921, Machinery Act, Appendix, page 90).

(6) *Telegraph, Telephone, Express, Sleeping Car, Refrigerator and Freight Car, Street Railways, Waterworks, Electric Light and Power, Gas, Ferry, Bridge, Canal and all other Corporations, (except railroads) exercising the right of eminent domain.*

Under sections 49 to 54 of Chapter 38, Public Laws, 1921, both inclusive, the corporations of the kind above mentioned, are required to make reports to the State Tax Commission, giving certain information as to each class and under section 55 of

said statute the State Tax Commission may require any other information desired.

We have not printed the sections above named as part of the appendix as we do not consider the form of the report material.

Sec. 57, Chapter 38, Public Laws, 1921, then provides:

From the information furnished the State Tax Commission is required to value all of the property of such corporations and the statute declares that such valuation or appraisement shall be made by;

> "Taking the aggregate value of all the shares of capital stock in case shares have a market value, and in case they have none, taking the actual value thereof, or of the capital of said association, company, co-partnership or corporation in whatever manner the same is derived, in case no shares of stock have been issued; Provided, however, that in case the whole or any portion of the property of such association, company, copartnership or corporation shall be encumbered by a mortgage or mortgages, such board shall find the true cash value by adding to the market value of the aggregate shares of stock, or to the value of the capital if there should be no such shares the aggregate amounts of such mortgages and the result shall be deemed and treated as the true cash value of the property of the corporation."

If the corporation owns property in other states the value of the entire property ascertained as above is directed to be divided between the States according to certain rules set out in the statute, not deemed material to quote. Corporations of the kind above indicated are required to list locally with the local list takers and have appraised locally real estate not used in the daily business of the company; the appraised value of this locally listed real estate is deducted from the value of the property in the State as found by the State Tax Commission. So that the State Tax Commission, in fact, only appraises that which is not appraised locally and this appraisal is the market value of the stock, plus the mortgages, if any, deducting the locally appraised property.

(7) *Railroads.*

As to corporations, whose road is situate in two or more states, the State Tax Commission is required to find, in the manner provided by the statute, the value of the whole system, and to allocate this total value between the several states, on a main line mileage proportion, giving due regard to such factors, if any, as would increase or decrease the relative value of the main line in North Carolina.

Sec. 65, Chapter 38, P. L. 1921, Appendix, page 101.

This is the statute which the Commissioners of Revenue interprets as requiring an absolute main line mileage allocation.

The statute declares that "aggregate value of the physical or tangible property and the franchise as determined" in the mode required by the statute "shall be the true value of the property for the purpose of ad valorem taxation. Sect. 64 (c) Chapter 38, P. L. 1921, Appendix, page 100.

The statute directs that the franchise shall be valued in the following manner:

> "By due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration OF THE VALUE PLACED UPON THE WHOLE PROPERTY BY THE PUBLIC (the value of the physical property being deducted), AS EVIDENCED BY THE MARKET VALUE OF ALL THE CAPITAL STOCK, CERTIFICATES OF INDEBTEDNESS, BONDS OR ANY OTHER SECURITIES, THE VALUE OF WHICH IS BASED UPON THE EARNING CAPACITY OF THE PROPERTY." (Capitals supplied.)

Sec. 64-b Chapter 38, P. L. 1921, Appendix, page 100.

That is, the statute recognizes, that the value of the whole railroad, is the market value of its stocks and securities which represent the property.

The value of the physical property which is to be deducted, is the assessed value, a part of the physical property is locally listed and assessed, and the assessed value of this part is certified to the State Tax Commission.

The Railroad, itself, is appraised by the State Tax Commission, under section 64 (a), Chapter 38 Public Laws, 1921 Appendix page 100, which requires that this value shall be "determined by a due consideration of the actual cost of replacing the property with a just allowance for depreciation on rolling stock, and also other conditions to be considered as in the case of private property."

The State Tax Commission construes this to be either replacement cost or investment account costs.

The portion of the property assessed locally and that assessed by the State Tax Commission is defined in Sec. 62, Chapter 38, Public Laws 1921.

MODE OF ASSESSMENT ACTUALLY EMPLOYED AND RESULTS

(1) *Personal Property.*

"The valuation upon personal property is made by the tax payer when he lists his property and is binding upon the list taker but it may be corrected by the County Commissioners or Board of Equalization at the date fixed by the statute upon notice to the taxpayer."

Guano Co. v. New Bern, 172 N. C., 258.

Presumably this law is followed, therefore the tax payer values his own personal property. How this compares with true value there is no means of checking.

(2) *Real Estate.*

This is valued by appraisers as a matter of opinion, as to what it will sell for in the open market. The result as shown by the summary of the affidavits filed in the Court below (a copy of one of which is found in the printed record) as shown by the affidavit of C. J. O'Brien, is that real estate was in 1921 valued at 66.58 per cent of its actual sale value.

(3) Shares of stock of Corporations, in the hands of individuals or corporations. Not listed, appraised or taxed, except shares of stock in banks.

(4) Bank Stock, Shares of,

At market value, when they have any, if no market value then the actual value on the 1st day of May of each year, less deductions made as authorized by the statute.

(5) Property of Telegraph, Telephone and other corporations above referred to exercising the right of eminent domain, except railroads.

By the market value of the stock, either shares or otherwise, plus the amount of any mortgages on the property.

(6) *Railroads.*

We are not left to speculate, either as to the mode of or reason for the assessment of railroad properties in North Carolina. The State Tax Commission, in its report to the legislature, (p. r. p. 81) which was adopted by the legislature, as to this says:

> "Generally our valuation of the railroad lines in this State is based upon a mileage proportion of their investment account, which they have asked the Interstate Commerce Commission to adopt as the basis for making their rates, and to this mileage proportion we have added the value which we find to represent the intangible value of their North Carolina lines, based upon the volume of business in this state, greater than the average volume of traffic on their lines as a whole."

As to plaintiff's individual property, the Commissioner of Revenue (State Tax Commission) upon petition filed under the provisions of Section 28 (g) of Chapter 38, Public Laws, 1921, reduced the valuation on appraisement of plaintiff's property from a main line mileage proportion of its investment account to a main line mileage proportion of the cost of reproduction new brought down to date, less depreciation, as found by the Interstate Commerce Commission, reported to the States of North Carolina and Virginia, and not excepted to.

The reasons for adopting these valuations are given by the appraising bodies as follows:

By the State Tax Commission, for the original assessment:

(1) "Under the new Interstate Commerce Act, the Interstate Commerce Commission was required to make rates that will yield an average return of not less than five and one half per cent upon the railroad lines as a whole, and to find the fair value of these properties as a basis for making the new rates." p. c. p. 91.

(2) The Interstate Commerce Commission could not for many years complete the physical valuation of the railroad properties, and pending this final valuation the railroads have submitted to the Interstate Commerce Commission their combined investment account as the value upon which rates should be based.

(3) In the opinion of the State Tax Commission the "TIME HAS COME WHEN THE VALUE UPON WHICH A RAILROAD OR PUBLIC UTILITY IS PERMITTED TO EARN A RETURN IS THE VALUE UPON WHICH IT SHOULD PAY TAXES IN THE STATE."

(4) The increased value of other property in the State led to criticism, because it was understood that railroad property being already assessed at full value could not lawfully be increased.

To meet this criticism it became necessary to raise the assessment of railroad property.

The Commission adopted the expedient of taking their investment account and attempt to justify it upon the ground, as they say in their affidavit filed, that:

"A satisfactory estimate of value could not be made based upon the market value of the stocks and bonds of these companies on the first day of May, 1913, for the reason that the limited market and the limited number of shares and bonds sold on the market did not furnish, in our judgment, a fair index of the actual value of these properties as a whole, and more particularly did not furnish an index of the actual value of the properties of these companies located within the State of North Carolina, for the reasons hereinbefore stated; nor was it considered that the actual

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value of these properties could be fairly determined by their earnings, until there should be a fair return to normal conditions of operating costs, flow of traffic and stabilization of rates."

The Commissioner of Revenue, who after July 1, 1921, was vested with the powers of the State Tax Commission, in his answer says:

(1) "The statutes of North Carolina provide for the ascertainment of the proportion of plaintiff's properties in that state by the use of a main line mileage proportion. The correct main line mileage proportion is alleged by plaintiff 12.246 per cent for Virginia and 87.754 per cent for North Carolina, and that these properties were used." See p. r. p. 38.

(2) The ascertainment and finding of the Interstate Commerce Commission of the relative cost of reproduction new less depreciation in the two states where plaintiff's line is located, has no binding effect because the statutes require otherwise." See p. r. p. 38.

(3) Plaintiff, in its petition for review of the prior assessment filed in July, 1921, set out the cost of reproduction new less depreciation, brought down to date, the average market value of its and its lessor's stocks and bonds, over a period of five years average returns from the property showed a valuation based on a division of each of these sums, both by a main line mileage proportion and one based on the relative cost of reproduction new less depreciation, to-wit 18 percent for Virginia and 82 per cent for North Carolina. The defendant, Commissioner of Revenue avers that as these figures were set out by plaintiff in its petition for a review of the prior assessment based on investment account, plaintiff assented to an appraisal of its property based on a main line mileage proportion of cost of reproduction new less depreciation. (See Answer.)

The petition appears in full in the printed record, pages 82 to 88.

FURTHER FACTS

The average market value of all plaintiff's and its lessor companies' stocks, bonds and evidences of indebtedness for a period of six years was $17,717,000.00 p. r. p. 21.

The total Railway Operating Income from the properties for the five years eight months ended August 31, 1921, was $528,-161.31. See table p. r. p. 22.

The standard return, as fixed by the Interstate Commerce Commission under the Federal control Act, for the three years ended June 30, 1917, (being the earnings from the property after taxes and car hire) was $1,252,759.84 per year.

This represents the annual average income of the company from July 1, 1914 to August 31, 1920, with which it might pay rent of leased roads, interest and other fixed charges and dividends or return to stockholders if any. p. r. p. 84.

ARGUMENT

NEITHER THE STATE TAX COMMISSION, NOR THE COMMISSIONERS OF REVENUE FOLLOWED OR COMPLIED WITH THE CONSTITUTION OF THE STATE OR THE STATUTES, WHEN THEY ASSESSED PLAINTIFF'S PROPERTY FOR TAXATION ON A MAIN LINE MILEAGE PROPORTION OF (A) THE INVESTMENT ACCOUNT; OR (B) THE COST OF REPRODUCTION NEW BROUGHT DOWN TO DATE, AND THEREFORE THE ASSESSMENT IS ILLEGAL.

Louisville & N. R. R. v. Greene, 244 U. S., 522, 524, lays down this rule:

"The findings of an official body such as the Board of Valuation and Assessment, made—as was the case here—after hearing and upon notice to the tax payer, are quasi judicial in their character, and are not to be set aside or disregarded by the courts, unless it is made to appear that THE BODY PROCEEDED UPON AN ERRONEOUS

PRINCIPLE OR ADOPTED AN IMPROPER MODE OF ESTIMATING THE VALUE OF THE FRANCHISE OR FRAUD APPEARS. Pittsburg, *C. C. & St. L. R. Co. v. Backus*, 154 U. S., 421, 435, 436; *Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S., 585, 586. In this case there is no showing of fraud, THE CONTENTION BEING THAT THE BOARD DEPARTED FROM THE MODE PRESCRIBED BY THE STATUTES. IF THEY DID THIS, OR IF THEY PROCEEDED IN DISREGARD OF THE RIGHTS SECURED TO THE TAXPAYER BY THE STATE OR FEDERAL CONSTITUTION, OF COURSE THEY PROCEEDED UPON AN ERRONEOUS PRINCIPLE." (Capitals supplied.)

See also:

Cummins v. Merchants Ntl. Bank, 101 U. S., 153-164,
Raymond v. Chicago Union T. Co., 207 U. S., 20-41.

The right secured to plaintiff under the constitution of the state is to have all property in the state listed for taxation and assessed as to value by one uniform rule.

Constitution, Article V, Sec. 3,
Guano Company v. New Bern, 172 N. C., 258,
Redmond v. Commissioners, 106 N. C., 122,
Puitt v. Commissioners, 94 N. C., 709,
Kyle v. Commissioners, 75 N. C., 445,
Worth v. R. R., 89 N. C., 301,
A. & N. C. R. R. v. New Bern, 147 N. C., 165.

Plaintiff's property, as a whole, is valued by the Commission at the cost of reproduction new brought down to date, less depreciation as reported by the Interstate Commerce Commission to the State of North Carolina, and not objected.

This valuation is divided between the two states on a main line mileage proportion, the Commissioner of Revenue says the statutes of the state so provide.

The same report from the Interstate Commerce Commission to the state, (which was not excepted to) showing the cost of reproduction new, less depreciation, of plaintiff's line of railroad, which was adopted as the basis of the assessment, also shows the cost of reproduction new less depreciation of that part in Virginia and also of that part in North Carolina. Of course the percentage that each part is of the whole is a mere matter of mathematical calculation.

It is averred to be 82 per cent North Carolina and 18 per cent Virginia. See affidavit M. S. Hawkins, p. r. p. 73.

It is respectfully submitted that the Commissioner of Revenue misconstrued the statute. Sec. 65, Chapter 38, Public Laws 1921, Appendix page, 101.

The statute expressly recognizes that there may be factors which would give that part of the line in North Carolina, a greater or less value than the average of the whole system.

The statute commands that the assessing body shall consider these factors, if they exist.

Bearing in mind that the basis of valuation is reproduction cost and nothing else, (for this is admitted) then nothing else appearing, the actual value of the proportion in North Carolina must necessarily be the cost of reproduction of that part in North Carolina.

We respectfully submit that neither the Constitution of the State, nor the statutes justify taking the cost of reproduction new less depreciation as the true value in money of plaintiff's property.

Wilmington, C. & A. R. R. Co., v. Brunswick, 72 N. C., 10, lays down these rules:

"If it was made to appear that they (an assessing body) proceeded upon an erroneous principle, we might perhaps correct their valuation; but an error in the fact of the value of the property is beyond our power to correct.

We are not called on, and will not unnecessarily undertake to say as law, upon what principle the roadbed and

superstructure of a railroad shold be valued. But it may be useful to suggest for the consideration of county officers, some views which seem reasonable.

1. The cost of a structure, whether it be a house, or a railroad, is not the test of its value for taxation. Many instances might be given to show that such a rule would be absurd. A man may build a very costly house in a place which is afterwards found out to be malarious, and it is consequently valuless for habitation. An inventor constructs a costly machine, which from some fault does not work, etc.

2. Neither is the value of the ties and rails, if removed, a test. It may be doubted whether a railroad company, having accepted privileges under its charter, would have a right, upon finding its road unprofitable, to tear it up and deprive the public of its use. THE TRUE POINT OF INQUIRY IS, WHAT IS THE VALUE OF THE LAND AND STRUCTURE AS IS ACTUALLY USED, OR AS IT IS CAPABLE OF BEING USED, WITHOUT LOSING ITS CHRACTER AS AS A RAILROAD." (Capitals supplied).

In line with the above decision by the Supreme Court of North Carolina are the decisions of this Court, as well as the Courts of other States.

Columbus Southern R. R. v. Wright, 151 U. S. 470 quotes with approval from Nashville, *C. & St. L. R. R. Co., v. Franklin County,* 12 Lea (Tenn.) as follows:

"The property of a railroad company, for the purpose of taxation, consists of its realty, its local personalty, its rolling stock, its choses in action, and its franchises. The franchise is the privilege conferred, by the charter of incorporation namely the right to exercise all the powers granted in the mode prescribed for the purpose of profit. It is a unit, not confined to any one country in which it may be exercised * * * The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the narrow strip of land appropriated for the use of the road, and the bars and cross ties thereon.

THE VALUE OF THE ROADWAY AT ANY TIME IS NOT THE ORIGINAL COST, NOR, A FORTIORI, ITS ULTIMATE COST AFTER YEARS OF EXPENDITURES IN REPAIRS AND IMPROVEMENTS.

ON THE OTHER HAND, ITS VALUE CANNOT BE DETERMINED BY ASCERTAINING THE VALUE OF THE LAND INCLUDED IN THE ROAD ASSESSED AT MARKET PRICE OF ADJACENT LANDS, AND ADDING THE VALUE OF THE CROSS TIES, RAIL AND SPIKES.

THE VALUE OF THE LAND DEPENDS LARGELY UPON THE USE TO WHICH IT CAN BE PUT, AND THE CHARACTER OF THE IMPROVEMENTS UPON IT.

THE ASSESSABLE VALUE, FOR TAXATION, OF A RAILROAD TRACK CAN ONLY BE DETERMINED BY LOOKING AT THE ELEMENTS ON WHICH THE FINANCIAL CONDITION OF THE COMPANY DEPENDS, ITS TRAFFIC, AS EVIDENCED BY THE ROLLING STOCK AND GROSS EARNINGS IN CONNECTION WITH ITS CAPITAL STOCK."(Capitals supplied).

Cleveland, C. C. & St. L. R. R. Co., v. Backus, 154 U. S., 421 lays down the rule as follows:

"The stock and the indebtedness represent the property. As said by Mr. Justice Miller in State R. Tax Case 92 U. S. 605 (23 Law Ed. 670): 'When you have ascertained the current cash value of the whole funded debt and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for those are all represented by the value of its bonded debt and of the shares of its capital stock."

Branson v. Bush, 251 U. S. 182, says:

'This is the method of assessing railroad property, often

approved by this Court, specifically in Cleveland, C. C. & St. L. R. Co., v. Backus, 154 U. S. 430, 445 * * * saying:

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privileges of using the property, but rests solely upon value. But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value and if property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put."

State v. Central Pacific Co., 10 Nev., 47-74, says:

"To determine the value of a railroad, then, the very first inquiry is as to its actual cost, the necessary cost is the proper standard. If it further appears that the net income of the road does not amount to current rates of interest on its necessary cost, and is not likely to do so, or if the busi ness of the road is likely to be destroyed or impaired by competition or other causes or, in short if the utility of the road is not equal to its costs then its value is less than its cost, and must be determined by reference to its utility alone."

And, People v. Clapp, 152 N. Y., 400, 46 N. E. 842, says:

"There is no reason that we can perceive for assessing this property at a greater sum than the cost of replacement, it may not in every case be worth what it would cost to reproduce it. That would depend upon the income or earning capacity of the road after it was built."

The above authorities establish the principle which is of course sound, that the value of a structure is not necessarily

what it cost, but on the other hand either what it will sell for or what it can be made to yield.

Defendants in their answer, section 23, page 40, say:

> "A sale of the entire securities of such corporation would in no way constitute a transfer of the large intangible property values inhering in the right to that corporation to exist and to do business as such and other intangible values inhering in it, and many of such values and properties could not be sold or transferred at all by the railroad corporation without the consent of the State."

This position, of course, is based on what the Supreme Court of the State said in the case of Wilmington, C. & A. R. R. v. Brunswick, supra, as to the right of a railroad company to abandon its franchise or stop the operation of the road, which of course prevents a sale of its property without legislative consent.

What then is the value in money of a piece of property which cannot without legislative consent be sold or its operation stopped?

Is it the cost of reproduction new, less depreciation, or that sum on which plaintiff may, if it can, earn 5½ per cent?

We submit the reasoning given by the State Tax Commission for its conclusion is faulty.

The assessors say Interstate Commerce Commission has been required to fix a rate which will yield to all the railroads in the United States 5½ per cent on the aggregate value of all the property of all railroads; we will tax each railroad on the basis of its porportion of the amount on which the whole may earn, if they can. The result is the poor road with light traffic and small return pays on an overvaluation, the other road either goes comparatively free or the rule of assessment is varied.

Rather, we submit, is the proper and true value that sum

which the net income capitalized at current rates of interest would produce.

This rule would bring the mode of assessment in harmony with the decisions, *supra*, as to what constitutes the value of a railroad, would comply with the statute, which says they value of the entire property, tangible and intangible, shall be the value which the public places on the property, as evidenced by the market value of its stocks, bonds and certificates of indebtedness dependent for their value on the earning capacity of the property. The statute says the aggregate value of the tangible and intangible property shall be the true value for ad valorem taxes. The intangible value is declared to be the sum which the public determines as shown by the market value of the stocks and bonds, and from this intangible value the value of the tangible property is to be deducted. Appendix page 86. The statute, therefore, never contemplated that the property should be valued at more that the market value of the stocks and bonds.

Wherefore it is respectfully submitted that the mode of assessment was not that provided by the statute or the Constitution.

THE ASSESSMENT AS MADE UNLAWFULLY IMPORTS VALUES INTO THE STATE IN VIOLATION OF THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION.

This contention is based on the following admitted facts, or facts incapable of serious controversy:

1. The basis of assessment is a main line mileage proportion of the cost of reproduction new of the whole system, brought down to date, less depreciation, as reported to the State of North Carolina by the Interstate Commerce Commission, and not excepted to.

2. That this main line mileage proportion is 87.754 per cent, for North Carolina and 12.246 per cent, for Virginia.

3. That the actual cost of reproducing that part of the line in Virginia is 18 per cent, and in North Carolina 82 per cent, of the whole cost of reproduction new brought down to date, less depreciation, as reported by the Interstate Commerce Commission.

4. That the Commissioner of Revenue says he is required by statute to use the main line mileage proportion, instead of the actual relative cost in alocating the whole value between the two States.

The only question then is, do these facts bring the case at bar within the principle laid down in Wallace v. Hines, 253 U. S., 66170, where the Court says:

> "As the law is administered, the tax commission fixes the value of the total property of each railroad by the total value of its stocks and bonds, and assesses the proportion of this value that the main line track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a State of plains, very different from the other States, and the cost of the road there was much less than it was in the mountainous regious that the road had to traverse. The State is mainly agricultural. Its markets are outside its boundaries, and most of the distributing centers from which it purchases are also outside. It naturally follows that the great and very valuable terminals of the road are in other States. So looking only to the physical track, the injustice of assuming the value to be evenly distributed according to the main line track is plain. But that is not all. The only reason for a State to look beyond its borders, when it taxes the property of foreign corporations, is that it may get the true value of the thing within it, when they are part of an organic system of wide extent that gives them a value above what they

otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart,—not, in other words, to open to taxation what is not within the State. Therefore no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State."

The case at bar is even stronger than the above mentioned case.

The basis of assessment is reproduction cost. The statute as interpreted requires a main line mileage proportion, irrespective of relative cost, which is the basis of value; this requirement of the statute takes $1,300,000.00 from the 112 miles in Virginia, and adds it to the 800 miles, or thereabouts, in North Carolina. It is indefensible.

THE STATUTES OF THE STATE, IN AND OF THEMSELVES, CREATE A SYSTEM OF TAXATION WHICH VIOLATES THE UNIFORMITY CLAUSE OF THE STATE CONSTITUTION AND THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION.

The Constitution of the State, Article V, Sec., 3, specifically requires that:

"Laws shall be passed taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise."

Says the Supreme Court of the State as to this provision of the Constitution:

> "The subjects of every state ought to contribute to the support of the government, as nearly as possible, in proportion to their respective abilities, that is, in proportion to the revenue which they respectively enjoy under the protection of the State. The expense of the government to the individuals of a great nation is like

the expense of management to the joint tenants of a great estate, where all are obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called equality or inequality of taxation.

Under the construction of the Constituuon, as declared in Pullen's case, it would be in the discretion of the legislature to unequally distribute the burden necessarily incident to government, and the worst species of class legislation would be tolerated. It would (says Dixon, C. J., in Knowltown v. Supervisors, 9 Wis., 422) make the Constitution operative only to the extent of prohibiting the legislature from discriminating in favor of particular individuals and would reduce the people, while considering so grave and important a proposition, to the ridiculous attitude of saying to the legislature, you shall not discriminate between single individuals or corporations, but you may divide the citizens up into different classes as * * * owners of different species or descriptions of property, and legislate for one class and against another as much as you please, provided you serve all of the favored or unfavored classes alike, thus affording a direct and solemn constitutional sanction to a system of taxation so manifestly and grossly unjust that it will not find an apologist anywhere—at least outside of those who are the recipients of its favors.'

Such a construction, in our opinion, not only offends the true spirit of the Constitution, but has been distinctly and solemnly repudiated by the uniform decisions of this Court in subsequent cases. These cases decide that when the taxing power is exercised for a public purpose, the Constitution, and not the legislature, declared what property shall be taxed, and that it requires that all shall be taxed by a uniform rule and ad valorem."

Redmond v. Commissioners, 106 N. C., 122.

Plaintiff, under the Constitution of the State, has the right to have all property in the State, including investments in bonds, stocks, joint stock companies, placed on the tax list, and have them assessed at their true value in money by one uniform rule.

This the legislature declines to do.

As has already been shown, supra page 50, the legislature expressly provides that no individual stockholder in any corporation or joint stock company shall be required to list stock owned or pay any taxes thereon, where it is stock of a domestic corporation, or if, of a foreign corporation, when two thirds of the corporation's entire property is situated in the State, or if the corporation has tangible assets in the state equal to the par value of the stock of the company held in the state, and the corporation pays a franchise tax.

It will no doubt be contended that while the statute does not require the individual stockholder to list and pay a tax upon his investment in bonds, stocks, joint stock companies, or otherwise, the corporation pays on the capital stock and this is a compliance with the Constitution.

As we have already seen, the statute requires corporations to list their capital stock, and directs how it shall be assessed. Supra page 50.

That is at their market value (if they have one, if not at their actual value) on the first day of May, first, however, deducting from this market or actual value the assessed value of all real and personal property owned by the corporation, the value of all shares of stock owned by the corporation, and the value of State, United States, Federal Farm Loan Bank and all Joint Stock Land Bank bonds owned by the corporation more than ninety days before the assessing period.

It is respectfully submitted that the requirements of the Constitution, as to investment in bonds, stocks and joint stock companies being assessed at their true value in money is not met or complied with by an assessment at not the true value in money, but the true value ,that is what they will sell for,

after deducting the assessed value of all property, real and personal ,owned by the corporation whose stocks are being taxed.

It is respectfully submitted that, that, which is thus assessed as capital stock is in truth and in fact the intangible value of the franchise of the corporation.

The market value of the shares of stock applied to the whole of the capital stock is the value of the tangible and intangible property. Deducting from this aggregate value of the tangible and intangible property, the appraised value of of the real and personal estate and the non-taxable bonds, we have left the value of the franchise or intangible value, which is of course in and of itself property and subject to taxation.

The Supreme Court of the State, in Commissioners v. Tobacco Company, 116 N. C., 441, says:

"As to corporations, by all the authorities, it is in the power of the legislature to lay the following taxes, two or more of them, in its discretion, at the same time: (1) To tax the franchise (including in this the power to tax also corporate dividends) (2) The Capital Stock (3) The real and personal property of the corporations. This tax is imperative and not discretionary under the ad valorem feature of the constitution, (4) The shares of stock in the hands of the stockholder. This is also imperative and not discretionary."

In Pullen v., Commissioners, 152 N. C., 548-583 Manning, J., for the Court, says:

"It is likewise well settled by the language of our State Constitution, by many decisions of this Court, and of the Supreme Court of the United States, and now generally accepted law, that the property of a shareholder of a corporation in its shares of stock is a separate and distinct species of property from the property

whether real, personal or mixed, held and owned by the corporation itself as a legal entity. It would be useless to cite authority to support a proposition so well established and generally accepted."

That case was one where the statute required the bank to list for the shareholder the shares of stock owned by him, to pay the taxes assessed against the stock and deduct from dividends due the stockholder or otherwise collect from him; the question at issue was the right in assessing the value of shares of stock to deduct from such value the face amount of state bonds, which so provided on their face. The court held the deduction could be made. The point here raised was not raised or presented in that case.

The statute in this case, as to ordinary industrial corporations, does not require the owner to list the stocks at all.

The statute authorizes the shares of bank stock to be listed at their market value, less certain deductions, the court holding this to be valid upon the theory that the legislature may declare what is true value, or what that term means.

The statute, supra 51 authorizes or fixes the true value of the property of all corporations exercising the right of eminent domain (except railroad companies) as being the market value of the stocks of the company, plus the mortgage debts, if any.

The statute as interpreted as to railroads fixes their value at their investment account, or reproduction cost, or that sum upon which they are allowed, if they can, to earn 5½ per cent.

As to real estate, it appears from the evidence that as a result of the review of the valuation made in April, 1921, under the Act of 1921, that on the average it is assessed at 2-3 of its sale value.

This proportion of assessed to sales value differs in the several counties, ranging all the way from 23.10 per cent, in Jackson County and 35.91 per cent, in Wayne, to 90.06 per

cent in the adjoining county of Lenoir and 98.66 per cent, in Carteret County, divided from Lenoir by Craven.

This variation of values in the several counties does not materially harm any tax payer whose property is listed locally, provided the local assessors make their relative valuations fair in the several counties. The burden comes on that class of taxpayers whose property is assessed by the State Tax Commission at full value, and this full value certified to the several counties on a mileage pro rate. In that way, to illustrate by Wayne County, the property of Norfolk Southern, Atlantic Coast Line and Southern situate in that county is assessed at full value, while local real estate is assessed at one third, or slightly over.

We respectfully submit that there is no uniform rule as commanded by the constitution for the assessment of the property in the state.

The failure to adopt this uniform rule for assessing all property in the State violates plaintiff's constitutional rights for that under the Constitution, Article IX, Sec. 3, every county in the state is divided into school districts, in each of which a six months school must be maintained each year; the county commissioners are required to ascertain the amount of money necessary to support a school for six months, also to ascertain the amount of property in the country subject to taxation and levy such a rate as will produce the amount necessary to maintain the six months school: Consolidated Statutes, Sec., 5486. Therefore every dollar of property which the constitution requires to be listed, that is left off the tax list or not valued at its true value in money, directly increases the burdens of the other taxpayers.

These acts of the legislature, as interpreted by the Commissioner of Revenue, violates plaintiff's constitutional rights, for that they violate the State Constitution, being acts of the legislature they show a settled design and purpose to violate the State Constitution, to impose upon plaintiff an undue

burden of taxation and thereby violate the 14th Amendment to the Federal Constitution.

Louisville & N. R. R. v. Greene, 244 U. S. 522-524;
Raymond v. Chicago Union T. Co., 207 U. S. 20-41;
Cummins v. Merchants Nat. Bank, 101 U. S. 153;
Keith v. Lockhart, 171 N. C., 451 457.

Wherefore it is respectfully submitted that upon the admitted facts and the uncontradicted evidence, it appears:

1. That the assessors have not followed the rule laid down in the Constitution of valuing all property by one uniform rule at its true value in money.

2. That they have, in valuing plaintiff's property, imported values into the State.

3. That they have violated the uniformity clause of the State and Federal Constitutions.

4. That this has been done, not as matter opinion, as to values, but by the express command of the statutes of the state as interpreted.

5. That this shows a settled design to impose upon plaintiff's and other railroads an undue and unjust burden of taxation.

6. That under the decisions, both State and Federal, this is an illegal decision.

INJUNCTIVE RELIEF

The bill, sections 19 and 20, avers that the failure of the Commissioner of Revenue (State Tax Commission) to observe the plain mandate of the Constitution, and the statutes, results in valuing plaintiff's property at more than its true value in money, while other property in the State is assessed at less than its true value, throwing an undue burden of taxation on plaintiff, resulting in an illegal asessment, which the local taxing bodies are powerless to correct.

While an action at law may, under the statutes and decis-

ions of the State, be brought against a sheriff or local tax collector to recover an illegal tax when paid under protest, no such suit can be maintained, unless it is shown that the illegality arises, (not out of an erroneous assessment, but), solely because either (1) an error is made in the calculation of the tax, or (2) the rate of tax is illegal.

Guano Co., v. New Bern, 172 N. C., 258, where the Court says:

> "It is therefore incumbent upon the plaintiff, in order to set out a good cause of action, to allege that the tax it seeks to recover was levied upon a valuation greater than that fixed by the county authorities; that is to say, that the tax plaintiff has been forced to pay was greater than it would have been if correctly computed at the legal rate on the adjudged valuation. It is the difference that plaintiff would be entitled to recover. Pickens v. Smith, 112 N. C., 699."

Therefore Consolidated Statutes, Sec. 7979 has no application to a suit to test the validity of an assessment.

There is no board of review which can review an assessment originally made by the State Tax Commission, or Commissioner of Revenue, the only appeal from his decision or right of review at the time this action was instituted was in the matter of the valuation of the capital stock of corporations under Chapter 38, Public Laws, 1921, Sec., 43.

It is true that at a special session held in December, 1921 after this suit had been instituted, railroads were given the same right of appeal.

Even though it be conceded that Consolidated Statutes, Sec. 7979, Appendix, page 75 applied in order to recover back the taxes paid, plaintiff would then be compelled to bring at least sevent-five or more suits to recover back the illegal taxes.

That equity has jurisdiction to prevent a multiplicity of suits is too well settled to need the citation of authority.

Under the decisions, supra, a court of equity will enjoin the collection of a tax upon an illegal assessment, unless there is a plain and adequate remedy at law.

In this case there is no remedy whatever.

It may be suggested here, as it was in the Court below, that the granting of an interlocutory injunction is a matter of discretion, that the Court below declined as a matter of discretion to grant an injunction, pendente lite.

In this case the only remedy sought is a final injunction if an injunction pendente lite be not granted, then the suit is terminated and at end, for in that case plaintiff will be compelled to pay the taxes, and the taxes once paid the suit terminates.

> Singer Mfg., Co. v. Wright, 141 U. S., 696;
> People of the State of California, v. San Pablo & Tulare R. Co., 149 U S., 308, 341.

Wherefore, it is respectfully submitted that the Court below erred in refusing to grant the motion for an interlocutory injunction as prayed.

W. B. RODMAN,
C. M. BAIN
JOHN M. ROBINSON,
W. B. RODMAN, Jr.
For Plaintiff Appellant.

APPENDIX

CONSOLIDATED STATUTES

Sec. 3515: PENALTY FOR FAILURE TO RECEIVE AND FORWARD FREIGHT TENDERED.

Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a sidetrack, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusng to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day such company refuses to receive such shipment of freight and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment.

CONSOLIDATED STATUTES

Sec. 7979: REMEDY OF TAXPAYER FOR UNAUTHORIZED TAX.

Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain the sale of any property for the nonpayment thereof; nor shall any court issue any order in claim and delivery proceedings or otherwise for the taking of any personalty levied on by the sheriff to enforce payment of such

tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city, or town, for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city, or town for the amount so demanded, including in his action against the county both state and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose ,or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer.

CONSTITUTION OF NORTH CAROLINA

ARTICLE IV

Sec. 9: CLAIMS AGAINST THE STATE. The Supreme Court shall have original jurisdiction to hear claims against the state, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action.

ARTICLE V

Sec. 3. TAXATION SHALL BE BY UNIFORM RULE AND AD VALOREM; EXCEPTIONS.

Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds stocks, joint-stock companies, or otherwise; and, also ,all real and personal property, according to its true value in money: Provided, notes, mortgages, and all other evidence of indebtedness given in good faith for the purchase price of a home, when said purchase price does not exceed three thousand dollars, and said notes, mortgages, and other evidence of indebtedness shall be made to run for not less than five nor more than twenty years, shall be exempt from taxation of every kind; Provided, that the interest carried by such notes and mortgages shall not exceed five and one-half per cent. The general assembly may also tax trades, professions, franchises, and income: "Provided, the rate of tax on incomes shall not in any case exceed six per cent and there shall be allowed the following exemptions, to be deducted from the amount of annual incomes, to-wit: for a married man with a wife living with him, or to a widow or widower having minor child or children, natural or adopted, not less than $2,000; to all other persons not less than $1,000, and there may be allowed other deductions (not including living expenses) so that only net incomes are taxed.

Sec. 6. TAXES LEVIED FOR COUNTIES.

The total of the state and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the general assembly, which may be done by special or general act: Provided, this limitation shall not apply to taxes levied for the maintenance of the public schools of the state for the term required by article nine, section three, of the constitution: Provided, further, the state tax shall not exceed five cents on the one hundred dollars value of property.

REVENUE ACT, 1919 CHAPTER 90, PUBLIC LAWS, 1919

Sec. 3. RATE.

There shall be levied and collected annually an ad valorem tax of eleven and two-thirds cents for State purposes, four cents for pensions and thirty-two cents for public schools, making forty-seven and two-thirds cents on every one hundred dollars value of real and personal property in this State required to be listed in "An act to provide for the assessment of property and collection of taxes," subject to exemption made by law.

Sec. 77. PRIVILEGE TAX ON RAILROADS.

Every steam railroad company and every person or agency operating a steam railroad in this State shall, on or before the thirtieth day of July in each year, make and return to the State Auditor, in such form and upon such blanks as shall be furnished by him, a true statement of the gross earnings of their respective roads for the preceding year ending the thirtieth day of June; of the number of miles of road operated by each such company or person, and the number of miles in the State, and the gross earnings per mile per annum during such year; which statement shall be verified by the oath of the secretary and treasurer of such companies, or of the person so operating such railroad, and the State Auditor shall certify said amount to the State Treasurer.

Sec. 78. RATE OF TAXATION.

The annual license tax for operating such railroads within the State shall be as follows: When gross earnings per mile are one thousand dollars or less per year, a tax of two dallars per mile; when gross earnings per mile exceed one thousand dollars per year but do not exceed two thousand dollars, a tax of four dollars per mile; when gross earnings per mile exceed two thousand dollars per year, but do not exceed three thousand, a tax of six dollars per mile; when gross earnings per mile are in excess of three thousand dollars per

year and not over five thousand dollars per year, a tax of eight dollars per mile; when gross earnings exceed five thousand dollars per mile per year, a tax of ten dollars per mile. The tax imposed by this section shall be paid to the State Treasurer at the time of making the report provided in section seventy-seven. No county, city, or town shall be allowed to collect any tax under this section.

Section 829. That nothing in the nine preceding subsections of this act shall apply to banks, insurance companies, fraternal, beneficent associations, building and loan associations, railroad express, telephone or telegraph companies, or other corporations, upon which a frainchise tax may be levied in other sections of this act.

REVENUE ACT, EXTRA SESSION, 1920 CHAPTER 1, PUBLIC LAWS, EXTRA SESSION 1920

Section 2. That section two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen (C. S., secs. 7769, 7770) entitled "An act to raise revenue" be repealed and the following substituted for section two of that act:

> Sec. 2. POLL AND PROPERTY TAX.—That no tax on property or polls shall be levied for the year one thousand nine hundred and twenty for the use of the State or for the State pension fund. There shall be levied and collected for the year one thousand nine hundred and twenty for the benefit of the State public school fund an *ad valorem tax of thirteen cents on every one* hundred dollars value of real and personal property in this State required to be listed by the revenue laws of the State, and on each taxable poll or male between the ages of twenty-one and fifty years, except the poor or infirm whom the county commissioners may declare and record fit subjects for exempton, there shall be levied

and collected for the year one thousand nine hundred and twenty a tax of thirty-nine cents."

Sec. 3. That section three of chapter ninety of the Public Laws of one thousand nine hundred and nineteen (C. S. sec. 7770) be repealed and designated as "obsolete."

Section 7. That for the purpose of providing additional revenue for the State in lieu of *ad valorem* tax on property heretofore levied by the State, the following taxes shall be levied and collected in the manner now provided by law for collection of similar taxes:

Sec. 7 (d). PRIVILEGE OR FRANCHISE TAX ON RAILROADS.

That sections seventy-seven and seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be repealed (C. S., 7856-7857) and that section eighty-two (9) (C. S., 7861) of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be amended by striking out of the third line of the said subsection the word "railroad;" that section eight-two of chapter ninety (C. S., 7861) of the Public Laws of one thousand nine hundred and nineteen be amended by inserting a new subsection to be designated as section eighty-two (6½) as follows:

"Section 82 (6½). RAILROADS.—Every railroad company doing business in this State shall, on or before the first day of October, one thousand nine hundred and twenty, and on or before the thirtieth day of July annually thereafter, make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission, and giving such infromation as the State Tax Commission shall require, for the purpose of carrying out the provisions of this section, and upon which report the State Tax Commission shall ascertain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege

tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for *ad valorem* taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one (0.1 per cent) of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for on or before the first day of October, one thousand nine hundred and twenty, it shall be the duty of the State Tax Commission to make an approximation from the reports and records on file in that department of the amount of taxes due under this section, and certify same to the State Auditor and Treasurer for collection. No county, city, or town shall be allowed to collect any taxes under this section. The tax imposed by this section shall be in addition to the tax imposed by section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen (C. S., 7857) prior to the ratification of this act, only in so far as the tax imposed by this section exceeds the tax imposed by section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen, and if the tax imposed by section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen for the year one thousand nine hundred and twenty have been paid by any railroad company such amount so paid shall be credited on the tax imposed by this section."

CHAPTER 34,—AN ACT TO RAISE REVENUE

Sec. 3. STATE TAXES.

No tax on any property in the State shall be levied for any of the uses of the State Government. The taxes hereinafter levied in this act are for the expenses of the State Government the appropriations of its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the State, as equalizing fund for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the State Treasurer.

Sec. 4 CORPORATION TAXES PAYABLE TO STATE TREASURER.

Every corporation, joint-stock association, limited partnership, or company whatsoever, from which a report is required by law to be made to the Corporation Commission, shall be subject to and pay to the State Treasurer annually the franchise tax imposed by section 82 of this act; it shall be the duty of the State Auditor to mail to every such corporation a statement of the amount of such taxes, which statement shall contain a copy of so much of this section as relates to penalty as notice of penalty for failure to pay said taxes; and it shall be the duty of the treasurer or other officer having charge of any such corporation, joint-stock association, or limited partnership upon which a tax is imposed to transmit the amount of the tax to the State Treasurer within thirty days from the date of such notice. If such tax is not paid by the first day of November, it shall be the duty of the Auditor to send, not later that November fifteenth, final notice to such delinquent corporation that penalty will be imposed if payment is not made as required by this section. If the said tax is not paid by the first day of December next following, the State Treasurer shall certify to the State Auditor a complete list of all such taxes due and

unpaid. The State Auditor shall add ten per centum to such taxes, and return to the State Treasurer, charging the State Treasurer with the amount so added, and the State Auditor shall thereupon certify the same with such percentage added to the sheriff or tax collector of the county in which such delinquent corporation has its principal office, and charge such sheriff or tax collector with the amounts so certified. Such certificate by the State Auditor to the sheriff or tax colector in any county shall have the same force and effect as a judgment and execution against the real and personal property of such corporation as is given by Machinery Act for the collection of other taxes, and it shall be the duty of the sheriff or tax collector to proced to collect same, by levy, advertisement, and sale, in the same manner as provided by law for the collection of other taxes The sheriff or tax collector shall be allowed the same fees for collecting, or for levy, advertisement and sale, as provided by law for collection of other taxes, the same to be allowed in settlement with the State Treasurer, and in cases where the sheriff, after due diligence, is unable to collect the tax he shall be allowed credit for said amount in his final settlement for said years. The provisions of this section shall apply to any taxes payable directly to the State Treasurer that are due and unpaid at the time of the passage of this act, and such taxes may be certified for collection at any time: PROVIDED, that for the purposes of this act interests in limited partnerships or joint-stock associations shall be deemed to be capital stock, and taxed accordingly. Individual stockholders in any corporation, joint-stock association, limited partnership, or company paying a tax on its capital stock shall not be required to pay any tax on said stock or list the same, nor shall corporations legally holding capital stock in other corporations in this State, upon which the tax has been paid by the corporation issuing the same be required to pay any tax on said stock or list the same. Nor shall any individual stockholder of any foreign corporation be required to list or pay taxes on

any share of its capital stock if two-thirds in value of its entire property is situated and taxed in the State of North Carolina, or if such corporation has tangible assets within this State assessed for taxation at a value exceeding the par value of the total stock owned by citizens of this State, and the said corporation pays franchise tax on its entire issued and outstanding capital stock at the same rate as paid by domestic corporations.

Sec. 79. PRIVATE TAX ON EXPRESS COMPANIES. That every express company doing business in this State shall, on or before the thirtieth day of July in each year, make and return to the Corporation Commission a statement of the total number of miles of railroad lines over which such express company operates in this State; the said Corporation Commission shall certify the same to the State Treasurer as a basis for assessment and collection of the tax levied in the following schedule:

Sec. 79 (a). RATE OF TAXATION.

Each express company doing business in this State shall pay to the State Treasurer an annual privilege or license tax as follows: Any such company which earned from its express transportation business not more than six per cent upon its capital invested the previous calendar year shall pay at the rate of five dollars ($5) per mile. Any such company which so earned as much as seven per cent and less than eight per cent upon its capital invested the previous calendar year shall pay at the rate of six dollars ($6) per mile. And any such company which so earned eight per cent or more upon its capital invested the previous calendar year shall pay at the rate of seven dollars ($7) per mile. Any such company not having had previous earnings shall pay at the rate of five dollars ($5) per mile: PROVIDED, that no county shall levy any tax under this section. There may be levied and collected by every incorporated municipality in the State of

North Carolina from each express company, for the privilege of doing business within the municipal limits of said incorporated municipalities, a privilege or license tax, to be computed and based on the population of said municipalities, as follows: Incorporated municipalities having a population of five hundred people or less, five dollars per annum; incorporated municipalities having a population of five hundred people and not eveeeding one thousand people, ten dollars per annum; incorporated municipalities having a population of one thousand and not exceeding five thousand people, twenty dollars per annum; incorporated municipalities having a population of five thousand and not exceeding ten thousand people,, thirty dollars per annum; incorporated municipalities having a population of ten thousand and not exceeding twenty thousand people, fifty dollars per annum; incorporated municipalities having a population of exceeding twenty thousand people, seventy-five dollars per annum; PROVIDED FURTHER, that nothing in this section shall be construed to authorize the imposition of any tax upon interstate commerce, or upon any business transacted for the Federal Government.

Sec. 80. TELEGRAPH COMPANIES.

Each and every person, firm, or corporation operating within this State the apparatus necessary to communication by telegraph shall pay, for the privilege of engaging in such business, to the State an annual license tax of five dollars per mile for each pole mile of such telegraph line owned or operated by them within the State, as shown by report of such telegraph company to the Tax Commissioners under section forty-eight of the Machinery Act, and it shall be the duty of the Tax Commissioners to certify to the State Auditor the number of miles of line operated by such telegraph company in this State, and it shall be the duty of the State Treasurer to collect the tax as herein levied upon the basis of mileage as reported: PROVIDED, that nothing in this section shall

be construed to authorize the imposition of any tax upon interstate commerce or upon any business transacted for the Federal Government: PROVIDED, that no county shall levy any additional tax under this section, but towns may levy the following taxes: Those having a population of one thousand not exceeding five thousand, ten dollars; from five thousand to ten thousand, fifteen dollars; from ten thousand to twenty thousand, twenty dollars; over twenty thousand, fifty dollars.

Section 82 (3½). That where a report required to be made under the provisions of this section to the State Tax Commission by any domestic corporation shows capital stock issued and outstanding by any such company to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year in which report is made, or the report of any foreign corporation shows the proportion of the capital stock of such foreign corporation apportionable to this State under the rules laid down in section 82 of this act to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year in which such report is made, the measure of the extent to which the corporate franchise of any such corporation is being used and the amount of franchise tax to be paid by any such corporation shall be calculated with reference to the sum of one-half of the total assessed value of all the property of such corporation in this State.

Sec. 82 (6½). RAILROADS.

Every railroad company doing business in this State shall annually on or before the thirtieth day of July make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission, and giving such information as the State Tax Commission shall require, for the purpose of carrying out the provisions of this section, and upon which report the State Tax Commission shall ascertain and certify to the State Auditor the value upon which the amount of taxes which shall be paid by any such raiload

company as a franchise of privilege tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for ad valorem taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one per cent (0.1per cent) of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for, it shall be the duty of the State Tax Commission to make an approximation from the reports and records on file in that department of the amount of taxes due under this section, and certify same to the State Auditor and Treasurer for collection. No county, city or town shall be allowed to collect any taxes under this section.

Sec. 82 (11). Upon the payment of the tax or fee provided for in this act to the Treasurer of State, the Treasurer of State shall make out and deliver to the public utility or corporation so paying a receipt for the payment by such public utility or corporation of the tax or fee herein provided for.

Sec. 82 (12). The fees, taxes, and penalties required to be paid by this act shall be the first and best lien on all property of the public utility or corporation, whether such property is employed by the public utility or corporation in the prosecution of its business or is in the hands of an assignee, trustee, or receiver for the benefit of the creditors and stockholders thereof.

Sec. 82 (17). If a corporation, wherever organized, required by the provision of this act to file any report or return or to pay any tax or fee, either as a public utility or as a corporation, organized under the laws of this State, or as a foreign corporation for profit doing business in this State and

owning and using a part or all of its capital or plant in this State, or as a sleeping-car, freight line, or equipment company, fails or neglects to make any such report or return or to pay any such tax or fee for ninety days after the time prescribed in this act for making such report or return or for paying such tax or fee, the Commission shall certify such fact to the Secretary of State. The Secretary of State shall thereupon cancel the articles of incorporation of any such corporation which is organized under the laws of this State by appropriate entry upon the margin of the record thereof, or cancel the certificate of authority of any such foreign corporation to do business in this State, by proper entry. Thereupon all the powers, privileges, and franchises conferred upon such corporation by such articles of incorporation or by such certificate of authority shall cease and determine. The Secretary of State shall immediately notify such domestic or foreign corporation of the action taken by him.

MACHINERY ACT, 1921

CHAPTER 38,—PUBLIC LAWS OF N. C., 1921

Sec. 21. REAL PROPERTY TO BE ASSESSED AT ITS TRUE VALUE IN MONEY.

Real property shall be valued by the township list-taker and assessor, either from actual view or from the best information that the township list-taker and assessor can practically obtain, according to its true value in money. In determining the value the township list-taker and assessor shall consider as to each piece its advantage of location, quality of soil, quantity of standing timber, water privileges, water-power, mines, minerals, quarries, or other valuable deposits known to be available therein, and their value.

Sec. 22. PERSONAL PROPERTY TO BE ASSESSED AT ITS TRUE VALUE IN MONEY.

All articles of personal property shall, as far as practicable, be value by the list-takers and assessors according to their true

value in money; and after arriving at the total valuation of all articles of personal property which he shall be able to discover as belonging to any person, if he or they have sufficient evidence upon which to form a belief that such person has other personal property, consisting of money, credits, debts due or to become due, or any other thing of value liable, he, they, or the board of commissioners shall have power to take such action as may be necessary to get said property on the tax lists.

Sec. 23. DEFINING ACTUAL VALUE IN MONEY.

The intent and purpose of the tax laws of this State is to have all property and subjects of taxation assessed at their true and actual value in money, in such manner as such property and subjects are usually sold, but not by forced sale thereof, and the words "market value" or true value," whenever in the tax laws, shall be held and deemed to mean what the property and subjects would bring at cash sale when sold in such manner as such property and subjects are usually sold.

Sec. 28 (a). COUNTY BOARDS TO REVIEW VALUATION OF REAL ESTATE.

The board of county commissioners and the county board of appraisers and review, heretofore appointed under chapter eighty-four of the Public Laws of one thousand nine hundred and nineteen (any vacancy which may have occurred to be filled by appointment of the board of county commissioners), shall meet jointly in each county on the first Tuesday after the first Monday in April, one thousand nine hundred and twenty-one, as a county board of review, to determine if the value of real property as heretofore appraised and assessed in the county as a whole is in excess of the fair value of such property at the time of meeting of such board. The chairman of the board of county commisioners shall be the chairman of the county board of review as thus constituted, and the clerk of the board of county commissioners shall be the secretary of the said board. The said board shall make proper inquiry and investigation into the existing values of real property as compared with the assess-

ed and appraised values thereof in the several cities, towns, and townships of the county; and if it shall find that the assessed value of such property is in excess of the actual value, it shall find the average percentage of such excess in the county as a whole, or in the several cities, towns, and townships, and shall report its finding so made to the State Tax Commission not later than the twentieth day of April, one thousand nine-hundred and twenty-one. The values so reported shall be the values at which the property shall be assessed for taxation, unless and until the same have been changed and revisal by the State Tax Commission and certified to the board of county commissioners of such county, which shall be done not later than the first day of July, one thousand nine hunded and twenty-one.

Sec. 28 (g). Any taxpayer owning property assessed originaly by the State Tax Commission may make application to the State Tax Commission for a review of the assessment of its property in the same manner herein provided for complaint by property owners before the county boards, and the State Tax Commission may hear and determine such complaints.

Sec. 42. BANK TAXATION.

The value of such shares of stock of banks shall be determined as hereinafter in this section provided. Every bank, banking association, or savings institution (whether State or National), shall list its real estate in the county, city, or town in which such real estate is located, for the purposes of county and municipal taxation. Every such bank, banking association, or savings institution shall, during the month of May, post anually with the State Tax Commission, in the name of and for its shareholders, all the shares of its capital stock whether held by residents or nonresidents, as its market value on the first day of May, or, if it have no market value, then at its actual value on that day, from which market or actual value shall be deducted the assessed value of the real and personal property which such bank, banking association, or savings institution shall have listed for taxation in the county or counties wherein such real

and personal estate is located. The actual value of such shares, where such shares have no market value, shall be ascertained by adding together the capital stock, surplus, and undivided profits, and deducting therefrom the amount of real and personal property owned by said institution on which it pays tax, and dividing the net amount by the number of shares in said institution. Insolvent debts due said institution may be deducted from the items of undivided profits or surplus, if itemized and sworn to and forwarded to the State Tax Commission by the cashier of such institution. There shall also be deducted investments by such banks in bonds of this State, when such investments are made from the surplus of such banks. To be entitled to this deduction it must be shown by the reports of such banks that the bonds were purchased and paid for in full at least ninety days before the first day of the current year. If the State Tax Commission shall have reason to believe that the market or actual value as given in is not its true value, it shall ascertain such true value by such examination and investigation as to it seems proper, and change the value as given in to such an amount as it ascertains the true value to be, which action on the part of the State Tax Commission may be reviewed by the Superior Court by an action brought against the State Tax Commission in its official capacity by the party aggrieved. But no action shall lie until all taxes admitted by such aggrieved party to be due shall have been paid or tendered. The value of the capital stock of all such banks, as found by the State Tax Commission, shall be certified to the county and city in which the bank is located, except that as to banks having one or more branches the State Tax Commission shall make an allocation of the value of the capital stock as between the parent and branch banks in proportion to the deposits of the parent and branch banks and certify the allocated values so found to the counties and cities in which the parent and branch banks are located. The taxes so assessed upon the shares of any such bank, company, or association shall be paid by the cashier, secretary, treasurer, or proper accounting officer thereof, and in the same

manner and at the same time as other taxes are required to be paid in such county, special school district or city; in default of such payment such cashier, secretary, treasurer, or other accounting officer as well as such bank, company, or association shall be liable for such taxes, and in addition, for a sum equal to ten per centum thereof. Any taxes so paid upon any such shares, may, with the interest thereon, be recovered from the owners thereof by the bank, company, association, or officer paying them, or may be deducted from the dividends accruing on such shares. The taxation of shares of any such bank, banking association, or savings institution shall not be at a greater rate than is assessed upon other moneyed capital in the hands of indiivdual citizens of this State, whether such taxation is for State, county, school, or municipal purposes.

Sec. 43. REPORTS FROM CORPORATIONS.

Hereafter, except in the case of such corporations as are especially mentioned by name in other section of the Revenue Act, and required to make statements in other forms, it shall be the duty of the president, chairman, or treasurer of every corporation having capital stock, every joint-stock association, or limited partnership whatsoever, now or hereafter organized or incorporated by or under any law of this State, to make a report in writing to the State Tax Commission on or before the first day of July of each year, stating specifically:

1. Total authorized stock.
2. Total authorized number of shares.
3. Number of shares of stock issued.
4. Par value of each share.
5. Amount paid into the treasury on each share.
6. Amount of capital paid in.
7. Amount of capital on which dividend was declared.
8. Date of each dividend during said year ending with the first of May.
9. Amount of each dividend during the year ending with the first Monday in said month.
10. Highest price of sales of stock between the first and

fifteenth days of May; highest price of sale of stock during the year aforesaid; average price of sales of stock during the year.

And in said report one of the following named officers of such corporation, limited partnership, or joint-stock asociation, namely the president, chairman, secretary, or treasurer, after being duly sworn or affirmed to do and perform the same with fidelity and according to the best of his knowledge and belief, shall estimate and appraise the capital stock of said company at its actual value in cash on the first day of May, after deducting therefrom the assessed value of all real and personal estate upon which the corporation pays tax, and the value of the shares of stock legally held and owned by such corporation in other corporations incorporated in this State and paying taxes on its capital stock in this State, as indicated or measured by the amount of profit made, either declared in dividends or carried into surplus or sinking fund; and when the same shall have been so truly estimated and appraised they shall forthwith forward to the State Tax Commission a certificate thereof, accompanied by a copy of their said oath or affirmation, signed by them and attested by a magistrate or other person duly qualified to administer the same. Every such corporation may also show a deduction from the total amount of its capital stock, surplus, and undivided profits, the total amount of its actual investment in bonds of this State, and of the United States, and of the Federal Farm Loan Bank, and bonds of the Joint-stock Land Bank, which have been held as a continuing investment by such corporation for a period of not less than three months prior to the day on whic such report is required by law to be made: *Provided,* that if the State Tax Commission or either of them is not satisfied with the appraisement and valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, based upon the facts contained in the report herein required or upon any information within their possession, and to settle an account on the valuation so made by them for taxes, penalties, and interest due the State thereon, of which such settlement immediate

notice shall be given to such corporation by said State Tax Commission, with the right to the company dissatisfied with any settlement so made against it to appeal to the Superior Court in term-time of the county in which such company has its principal place of business in this State, and thence to the Supreme Court of this State; but before such company shall be allowed to exercise the right of appeal it shall, within twenty days after notice of such settlement, file with the State Tax Commission exceptions to the particulars to which it objects, and the grounds thereof, and said State Tax Commission shall hear said exceptions, after ten days notice of such hearing given by said State Tax Commission to said company; and if they shall overrule any of said exceptions, then such company, if it desires to appeal to said Superior Court, shall, within ten days thereafter, give notice to aaid State Tax Commission of such appeal to said Superior Court, and the State Tax Commission shall thereupon transmit to said Superior Court a record of said settlement, with the exceptions of the company thereto, and all decisions thereon, and all papers and evidence considered in making said decision. The said cause shall be placed on the civil docket of said Superior Court, and shall have precedence of all other civil actions, and shall be tried under the same rules and regulations as are prescribed for the trial of other civil causes. The cause shall be entitled, "State of North Carolina, on the relation of State Tax Commission against such company." Either party may appeal to the Supreme Court from the judgment of the Superior Court under the same rules and regulations as are prescribed by law for other appeals, except that the State of North Carolina, if it shall appeal, shall not be required to give an undertaking or make any deposit to secure the cost of such appeal; and the Supreme Court may advance the cause on their docket so as to give the same a speedy hearing; and in the event of the neglect or refusal of the officers of any corporation, company, joint-stock association, or limited partnership for a period of sixty days to make the report and appraisement to the State Tax Commission as here-

in provided, it shall be the duty of the State Tax Commission to estimate a valuation of the capital stock of such defaulting corporation, company, joint-stock association, or limited partnership, and settle an account for taxes, penalty, and interest thereon, from which settlement an appeal may be made to the Superior Court of the county in which the corporation has its principal place of business. The State Tax Commission is forbidden to divulge or make public any report of a corporation required to be made to it by this section. The State Tax Commission shall prepare and keep a record book, upon which it shall enter a correct list of all the corporations and banks which it has assessed for taxation, and said record shall show the assessed valuation placed upon same by it: *Provided*, that the reports required to be made by this section may be examined, upon application, by the solicitor of the State for the district in which the corporation has its principal office, or in any investigation by the board of commissioners of a county the reports of corporations having their principal office in such county may be examined upon order of the board of county commissioners or their authorized representative.

Sec. 57. MANNER OF ASSESSMENT.

Said State Tax Commission shall first ascertain the true cash value of the entire property owned by the said association, company, copartnership or corporation from said statements or otherwise for that purpose, taking the aggregate value of all the shares of capital stock, in case shares have a market value, and in case they have none, taking actual value thereof or of the capital of said association, company, copartnership, or corporation in whatever manner the same is divided, in case no shares of capital stock have been issued: PROVIDED, HOWEVER, that in case the whole or any portion of the property of such association, company, copartnership, or corporation shall be encumbered by a mortgage or mortgages, such board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock, or to the value of the capital in case there

should be no such shares, the aggregate amounts of such mortgage or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, copartnership, or corporation. Such State Tax Commission shall, for the purpose of ascertaining the true cash value of property within the State of North Carolina, next ascertain from such statements or otherwise the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situated within the State of North Carolina, and not specifically used in the general business of such associations, companies, copartnerships, or corporations, which assessed value for taxation shall be by said board deducted from the gross value of the property as above ascertained. Said State Tax Commission shall next ascertain and assess the true cash value of the property of the associations, companies, copartnerships, or corporations within the State of North Carolina by taking as a guide, as far as practicable, the proportion of the whole aggregate value of said associations, companies, copartnerships, or corporations as above ascertained, after deducting the assessed value of such real estate without the State which the length of lines of said associations, companies, copartnerships, or corporations, in the case of telegraph and telephone companies, within the State of North Carolina, bears to the total length thereof, and in the case of express companies and sleeping-car companies the proportion shall be the proportion of the whole aggregate value, after such deduction, which the length of lines or routes within the State of North Carolina bears to the whole length of lines or routes of such associations, companies, copartnerships, or corporations, and such amount so ascertained shall be deemed and held as the entire value of the property of said associations, companies, copartnershaps, or corporations within the State of North Carolina. From the entire value of the property within the State so ascertained there shall be deducted by the commissioners the assessed value for taxation of all real estate, struc-

tures, machinery, and appliances within the State, and subject to local taxation in the counties as hereinbefore described, in sections fifty-one, fifty-two, fifty-three, fifty-four, fifty-five, and fifty-six of this act, and the residue of such value so ascertained after deducting therefrom the assessed value of such local properties, shall be by said board assessed to said association: PROVIDED, the State Tax Commissioners shall also assess the value for taxation of all structure, machinery, appliances, pole lines, wire and conduit of telephone and telegraph companies within the State subject to local taxation, but land and buildings located thereon owned by said companies shall be assessed in like manner and by the same taxing officials as though such property was owned by individuals in this State.

Sec. 61. RAILROADS.

The commissioners selected from time to time under authority to establish the North Carolina State Tax Commission shall constitute a board of appraisers for railroad, canal, and steamboat companies, and other companies exercising the right of eminent domain.

Sec. 62. RAILROADS.

The president, secretary, superintendent, or other principal accounting officed within this State, of every railroad, telegraph, telephone, street railway company, whether incorporated by the laws of this State or not, shall, at such date as real estate is required to be assessed for taxation, return to the said commission for assessment and taxation, verified by the oath or affirmation of the officer making the return, all the following described property belonging to such corporation within this State, viz: The number of miles of such railroad lines in each county in this State, and the total number of miles in this State, including the roadbed, right of way, and superstructures thereon, main and sidetrack depot buildings and depot grounds, section and tool houses, and the land upon which situated and necessary to their use; water stat-

ions and land, coal chutes and land, and real estate and personal property of every character necessary for the construction and successful operation of such railroad, or used in the daily operation, whether situated on the charter right of way of the railroad or on additional land acquired for this purpose, except as provided below, including, also, if desired by the State Tax Commission, Pullman or sleeping cars or refrigerator cars owned by them or operated over their lines: PROVIDED, HOWEVER, that all machine and repair shops, general office buildings, storehouses, and contents located outside of the right of way, and also real and personal property other than the property as returned above to the State Tax Commission, shall be listed for purposes of taxation by the principal officers or agents of such companies with the list-takers of the county where the real and personal property may be situated in the manner provided by law for the listing and valuation of real and personal property. A list of such property shall be filed by such company with the State Tax Commission. It shall be the duty of the register of deeds, if requested so to do by the State Tax Commission, to certify and send to the said commission a statement giving a description of the property mentioned in the foregoing proviso, and showing the assessed valuation thereof, which value shall be deducted from the total value of the property of such railroad company as arrived at by the commission, in accordance with section sixty-six, before the apportionment is made to the counties and municipalities. The registers of deeds shall also certify to the commission the local rate of taxation for county purposes as soon as the same shall be determined, and such other information obtained in the performance of the duties of their office as the said commission shall require of them; and the mayor of each city or town shall cause to be sent to the said commission the local rate of taxation for municipal purposes.

Sec. 62 (a). RAILROAD COMPANIES REQUIRED TO FILE MAPS ETC.

Section 62a. *Railroad Companies required to file maps, etc.* Every railroad company operating in this State shall also be required to file with the State Tax Commission a map or blueprint showing the location within the corporate limits of every incorporated city or town of its main line of road, and its length, together with location of its right of way, not exceeding one hundred feet in width, and the location and value of all real estate owned by any such company within the limits of any such city or town, and not included in the right of way so designated. Every such company shall also report the value of any and all buildings and structures within the limits of any such city or town, whether on or off its right of way, and the commission shall find the value of all such real estate, buildings, and structures, and shall certify to such city or town the value of same, in addition to the value per mile of so much of its main line as may be located within such city or town, for *ad valorem* taxation.

Sec. 63. RAILROADS.

The movable property belonging to a railroad company shall be denominated for the purpose of taxation "rolling stock." Every person, company, or corporation owning, constructing, or operating a railroad in this State shall, in the month of May, annually return a list or schedule to the State Tax Commission, which shall contain a correct detailed inventory of all the rolling stock belonging to such company, and which shall distinctly set forth the number of locomotives of all classes, passenger cars of all classes, sleeping cars and dining cars, express cars, horse cars, cattle cars, coal cars, platform cars, wrecking cars, pay cars, hand cars, and all other kinds of cars, and the value thereof, and a statement or schedule, as follows:

(1) The amount of capital stock authorized and the number of shares into which such capital stock is divided; (2) the

amount of capital stock paid up; (3) the market value, or if no market value, then the actual value of shares of stock; (4) the length of line operated in each county and total in the State; (5) the total assessed value of all tangible property in the State; (6) and, if desired, all the information heretofore required to be annually reported by section five thousand two hundred and ninety-one of the Revisal. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the commission, and with reference to amounts and value on the first day of May of the year of which the return is made.

Sec. 64. TANGIBLE AND INTANGIBLE PROPERTY ASSESSED SEPARATELY.

(a) At such dates as real estate is required to be assessed for taxation, the said commission shall first determine the value of the tangible property of each division or branch of such railroad of rolling stock and all other physical or tangible property. This value shall be determined by a due consideration of the actual cost of replacing the property, with a just allowance for depreciation on rolling stock, and also of other conditions, to be considered as in the case of private property.

(b) They shall then assess the value of the franchise, which shall be determined by due consideration of the gross earnings as compared with the operating expenses, and particularly by consideration of the value placed upon the whole property by the public (the value of the physical property being deducted), as evidenced by the market value of all capital stock, certificates of indebtedness, bonds, or any other securities, the value of which is based upon the earning capacity of the property.

(c) The aggregate value of the physical or tangible property and the franchise as thus determined, shall be the true value of the property for the purpose of an *ad valorem* taxation, and shall be apportioned in the same proportion that

the length of such road in each county bears to the entire length of such division or branch thereof; and the State Tax Commission shall certify, on or before the first day of September, to the chairman of the county commissioners and the mayor of each city or incorporated town the amount apportioned to his county, city, or town; all taxes due the State from any railroad company shall be paid by the treasurer of each company directly to the State Treasurer within thirty days after the first day of July of each year; and upon failure to pay the State Treasurer as aforesaid, he shall institute an action to enforce the same in the county of Wake or any other county in which such railroad is located, adding thereto twenty-five per centum of the tax. The board of county commissioners of each county through which said railroad passes shall assess against the same only the tax imposed for county, township, or other taxing district purposes, the same as is levied on other property in such county, township, or special taxing districts.

Sec. 65. RAILROADS.

When any railroad has part of its road in this State and part thereof in any other State, the said commission shall ascertain the value of railroad track, rolling stock, and all other property liable to assessment by the State Tax Commission of such company as provided in the next preceding section, and divide it in the proportion to the length such main line of road in this State bears to the whole length of such main line of road, and determine the value in this State accordingly: Provided, the commission shall, in valuing the fixed property in this State, give due consideration to the character of roadbed and fixed equipment, number of miles of double track, the amount of gross and net earnings per mile of road in this State, and any other factor which would give a greater or less value per mile of road in this State than the average value for the entire system. On or

after the first onday in July the said commission shall give a hearing to all the companies interested, touching the valuation and assessment of their property. The Said Commission may, if they see fit, require all argument and communications to be presented in writing.

Sec. 66. RAILROADS.

If the property of any railroad company be leased or operated by any other corporation, foreign or domestic, the property of the lessor or company whose property is operated shall be subject to taxation in the manner hereinbefore directed; and if the lessee or operating company, being a foreign corporation, be the owner or possessor of any property in this State other than that which it derives from the lessor or company whose property is operated, it shall be assessed in respect to such property in like manner as any domestic railroad company.

CHAPTER 96

(PUBLIC LAWS, EXTRA SESSION 1921)

AN ACT TO REFUND TAXES ILLEGALLY COLLECTED AND PAID INTO THE STATE TREASURY

The General Assembly of North Carolina do enact:

Section 1. Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the State Treasury in excess of the amount legally due the State, the State Auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certifiate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the Attorney-General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: PROVIDED, demand is made

for the correction of such error or errors within two years from the time of such payment: PROVIDED FURTHER, that claims which have arisen within the five years next preceding the ratification of this act shall be presented and made within two years from the ratification of this act.

FILED
MAY 18 1922
WM. R. STANSBU
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1921.

No. 368

THE SOUTHERN RAILWAY COMPANY, *Appellant*,

vs.

A. D. WATTS, as Commissioner of Revenue of North Carolina.

No. 369

ATLANTIC & YADKIN RAILWAY COMPANY, *Appellant*,

vs.

A. D. WATTS, as Commissioner of Revenue of North Carolina.

No. 381

SEABOARD AIR LINE RAILWAY COMPANY, *Appellant*,

vs.

A. D. WATTS, as Commissioner of Revenue of North Carolina.

No. 382

ATLANTIC COAST LINE RAILROAD COMPANY, *Appellant*,

vs.

A. D. WATTS, as Commissioner of Revenue of North Carolina.

No. 383

NORFOLK SOUTHERN RAILROAD COMPANY, *Appellant*,

vs.

A. D. WATTS, as Commissioner of Revenue of North Carolina.

REPLY BRIEF FOR APPELLANTS IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDERS PENDING APPEALS.

S. R. PRINCE,
THOS. W. DAVIS,
MURRAY ALLEN,
JOHN M. ROBINSON,
Counsel for Appellants.

L. E. JEFFRIES,
GEO. B. ELLIOTT,
W. B. RODMAN,
Of Counsel.

PRESS OF THE BYDWARTH CO., WASHINGTON

IN THE

Supreme Court of the United States

October Term, 1921

IN EQUITY.

Nos. 927, 928, 960, 961, 962.

SOUTHERN RAILWAY COMPANY,
Appellant,

vs.

A. D. WATTS, ET AL.,
Appellees.

Reply Briefs of Appellants in Support of Motion for Temporary Restraining Order Pending Appeal to the Supreme Court of the United States Under Section 266 of the Judicial Code of the United States.

This reply brief is filed with permission of the Court, it appearing that the appellants had not previous to Monday, May 15th, the date of submission of said motion, been served with or received a copy of the brief of appellees.

Appellants desire to assure the Court that they have no wish or purpose to hinder in the slightest

the early disposition of this case. The stay granted by the lower court would have expired on the fifteenth day of May, 1922. Appellant Southern Railway Company, in order to have its motion for stay in this court passed upon prior to May 15th, served copy of said motion on State's counsel on the twenty-seventh of April, notifying the State at the time that it would apply to this Honorable Court for the stay on May 1, 1922. It was at the suggestion of counsel for the State that the application for stay was postponed until May 15th upon the assurance that the present status would continue until this motion is passed upon by the Supreme Court of the United States. A similar agreement is a part of the record in each of the motions. This much is stated in order that the Court may know that the appellants are not too late in presenting this matter.

Appellees are correct in stating that the Three Judge Court denied the stay pending the appeal. The order of the Three Judge Court in denying the stay is as follows:

> "The Court, being of the opinion that the application to continue in effect the thirty-day stay granted March 18, 1922, until a review and decision can be had by the Supreme Court of the United States on the appeal heretofore taken from the order of this Court, denying the interlocutory injunction, should be presented to the Supreme Court of the United States, denies the application for continuance

of said stay until the appeal is decided by the Supreme Court of the United States."

From the foregoing it will be plainly seen that the Three Judges composing the lower court have particularly refrained from passing upon the merits of the motion for stay. All that was decided was that in the opinion of that court the motion for stay should be presented to the Supreme Court of the United States. It is a fact which can not and will not be denied that the members of that court individually expressed in the presence of counsel for both sides the view that the stay should be granted and held only that the application should be made to the Supreme Court of the United States.

Appellees, as was said in appellant's original brief, cite only one case in opposition to the granting of the motion and that is the case of L. & N. vs. Railroad Commission, 208 Fed. 29, at page 50, but as was said in the original brief (Southern Railway Appellant's brief, No. 927, page 9) the citation made by appellees is not the opinion of the court but is the concurring opinion of one judge, and the decree of the Court was to the contrary.

Appellees, page 6, state that the right of the plaintiff to recover taxes illegally paid is fully protected by the laws of North Carolina. In support of this, appellees cite an Act ratified December 19, 1921. It will be noted that the Act cited

refers only to taxes paid into the State Treasury. Those taxes in this case are the franchise taxes and the franchise tax is a small part of the total taxes involved in the litigation. That Act does not purport and it is not claimed that it covers taxes to be paid the counties, municipalities, road districts, special school districts, etc., and to these latter sub-divisions of the State the greater portion of the taxes involved in these cases will be paid. Furthermore, the Act of 1921 does not require the payment back, except upon the certificate of the head of the department through which the taxes were collected "with the approval of the Attorney General." It may or may not be possible to secure the certificate of the head of the department or the approval of the Attorney General. The State has not consented to be sued.

Appellees cite (p. 7) Section 7979 of the Consolidated Statutes of North Carolina as affording relief to appellants with respect to the taxes paid to counties, municipalities, special school districts, road districts, etc. Inadvertently the appellee has not quoted fully the section in question. That section reads as follows:

> "7979. *Remedy of taxpayer for unauthorized tax.* Unless a tax or assessment, or some part thereof, be illegal or invalid, or be levied or assessed for an illegal or unauthorized purpose, no injunction shall be granted by any court or judge to restrain the collection thereof in whole or in part, nor to restrain

the sale of any property for the nonpayment thereof; nor shall any court issue any order in claim and delivery proceedings or otherwise for the taxing of any personalty levied on by the sheriff to enforce payment of such tax or assessment against the owner thereof. Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the sheriff; but if, at the time of such payment, he shall notify the sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state or of the county, city, or town, for the benefit or under the authority or by request of the county, city or town for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue such county, city, or town for the amount so demanded, including in his action against the county both state and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of state taxes for which judgment shall be rendered in such action shall be refunded by the state treasurer."

It will be plainly seen from the foregoing Act that the law of North Carolina authorized an injunction in a case of this kind. The Supreme Court of North Carolina in the case of Range Co. vs. Carver, 118 N. C. 328, held that the effect of this section was to give an additional remedy to contest the validity of a tax, leaving it to the discretion of the taxpayer to pay the tax and sue to recover it back or to proceed by injunction. This and many other cases following it clearly indicate that it is the policy of the State to permit an injunction of an illegal or invalid tax.

We respectfully say to the Court that the statement made in appellees' brief (p. 7):

> "In addition to the foregoing statutes, the Attorney General and other State officers, parties defendant to this suit, have guaranteed in behalf of the State and the other taxing officers to repay to the plaintiffs any tax the collection of which is by this motion sought to be restrained in case the Court should ultimately decide that such taxes were illegally or wrongfully collected."

is not of record in this case. We know of no such guaranty. We do not think that any State officer has the power to make the guaranty, and therefore submit that the Court should not heed that statement.

Appellees cite the case of State Railroad Tax Cases, 92 U. S. 575, at page 613. Appellants have

no quarrel with the citation or the case, but the Court's attention is specifically directed to the paragraph of the said decision immediately following the one quoted by appellees. That paragraph of the opinion sets forth the doctrine which we think applicable in this case, and is as follows:

> "In this latter case, this court, after commenting upon the necessary reliance of the State governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter, says, 'No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to multiplicity of suits, or produce irreparable injury, or, when the property is real estate, throw a cloud upon the title of complainant before the aid of a court of equity can be invoked.' So, in the case of Hannewinkle vs. Georgetown, the court says, 'It has been the settled law of this country for a great many years, that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax cannot be maintained. There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction' 15 Wall. 548. We do not propose to lay down in these cases any absolute limitation of the

powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax" (92 U. S. 614).

The Supreme Court further held in the State Railroad Tax Cases that a clear case must be made for equitable relief before an injunction should issue.

It is shown, without contradiction, that the Southern Railway would have to bring to recover the taxes 160 separate suits; Atlantic & Yadkin 24 separate suits; Atlantic Coast Line 140 separate suits; Seaboard Air Line 99 separate suits; and the Norfolk Southern 83 separate suits. Therefore, the total number of suits that will be required to be brought by these appellants to recover the taxes if paid and held to be illegal will be 506. In addition to this, we say that in our opinion there is no means provided by law of forcing the repayment of the amount paid to the State direct, namely, the State franchise tax. The bills each further show that a cloud will be cast upon their property.

The "State Railroad Tax Cases" cited by appellees contains also a statement of the well recognized and eminently just rule of this Court that the taxpayers must pay that part of the tax which it can be seen from the face of the bill is due or which can be shown by affidavits to be due, and that the litigation should be over the contested portion of the tax. It was in recognition of this principle that appellants offered to pay to the State and the State accepted the payment under an agreement, approved by the three Judges, of taxes on the undisputed assessment. In the case of the Southern Railway Company the taxes already paid by Southern Railway Company under said agreement are sixty-one thousand dollars in excess of the total paid in 1920. The Atlantic Coast Line Railroad Company has already paid $92,990.00 more than it paid in the year 1920. The other appellants have also paid under the agreement in excess of the amount paid in 1920.

Appellants may not be able in this motion, due to inability to discuss the merits, to make it clear to the Court that they have been in fact discriminated against. Whenever a State passes an equalization law and it is claimed that under that all property in the State is brought up to 100 per cent and at the ensuing session of the legislature the State passes a law permitting county boards to *horizontally* reduce the assessments of real

property in their jurisdiction and the county boards in practically all of the counties through which these railroads run do make horizontal reductions ranging from 15 to 50 per cent, making no reduction in the property of the appellants because they do not make the assessment of the railroads, and the Commissioner of Revenue of the State acts, with others, as a board of equalization and approves the action of these county boards and permits those *horizontal* reductions to stand and declines to make any reduction in the real property of these railroads, then it is plain to all that the equalization which it was stated had been fairly made has been upset premeditatedly and the dislocation of values again restored and appellants are discriminated against. The burden thus put upon these railroads is magnified, in that, due to the reduction in the values in the counties of other property, the rates in those counties were raised from 12¼ to 84 cents per hundred dollars. In addition to this, the record shows without contradiction that other property generally in the State is assessed at 67 per cent of its sale value, while the State avers that appellant's property is assessed at true value, or 100 per cent. The result is plain. The railroads' value stays up and the tax rate is increased. The railroads are discriminated against. We claim that the scheme of the law itself seems to have contemplated such discrimination and that the plan has been carried out. It is a further fact

that what is termed a franchise tax is not a franchise tax, but is an additional property tax, and that law is invalid. In these cases we have shown this court, without contradiction, that unless the payment of the taxes is restrained, then the appeal allowed the appellants by the statute will be valueless. What appellants asked of the Court below was a restraint of the collection of the taxes until the case could be heard on its merits. The lower court denied that restraint. The statute gives appellants a direct appeal. If appellants pay the taxes there is no value to be derived from appealing the case. All that is asked of this Court is that the present status be maintained until this Court can hear our appeal, and we willingly consent that the causes be advanced so that the stay may be brief as is possible.

Respectfully submitted,

S. R. PRINCE,
THOS. W. DAVIS,
MURRAY ALLEN,
JOHN M. ROBINSON,
Counsel for Appellants.

FILED
NOV 18 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

IN EQUITY No. 368.

SOUTHERN RAILWAY COMPANY,
Appellant,

vs.

A. D. WATTS, ET AL., Appellees.

REPLY BRIEF FOR APPELLANT.

S. R. PRINCE,
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L. E. JEFFRIES,
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A. D. WATTS, ET AL., Appellees.

REPLY BRIEF FOR APPELLANT.

One of plaintiff's contentions is that the Tax Commission, in assessing its property in 1920, and the Commissioner of Revenue, in declining to change the same on review in 1921, failed to follow the statutory method as set forth in Sections 64 and 65 of the Machinery Act, ratified March 10, 1919 (Chapter 92, Public Laws of North Carolina, 1919), and identical Sections of Machinery Act, 1921. The Defendants, in their brief, in effect confess and seek to avoid by saying (1) that the State Tax Commission in 1920 and the Commissioner of Revenue in 1921 made no assessment, and (2) that said Sections 64 and 65 did not have

to be complied with, because the Legislature made the assessment in 1920 under the Revaluation Act of 1919 and is bound by no method, and the "Commissioner of Revenue made no assessments in 1921 and will not make any until 1924, and that until that date he will never be under the requirement of following the statutory method of assessment set forth in Sections 64 and 65 of the Machinery Acts if they are still in effect." (Appellees' brief, p. 36.)

We think the State errs in saying the State Tax Commission in 1920 and the Commissioner of Revenue in 1921 made no assessment. Section 3 of the Revaluation Act provided, in part:

> "Sec. 3. The *assessment* made under the provisions of this Act shall not be used as the basis for computation of taxes unless and until the same has been approved by the General Assembly, etc." (Italics ours.)

It would appear from the foregoing that an assessment was in fact made, even though not to be used as a basis for computation of taxes until approved by the General Assembly. This is made certain when we read in Chapter 1 of the Laws of North Carolina, Extra Session, 1920, which is the law that approved the assessment, the following:

> "Section 1. That the assessment or valuation of property, made under provisions of chapter eighty-four of the Public Laws of one thousand nine hundred and nineteen, is hereby approved by the General Assembly and adopted as the basis for the levy of tax rates by the State and by all subdivisions of the

> State for which taxes are levied for the year one thousand nine hundred and twenty, and the valuation of real property so fixed shall be adopted for the years one thousand nine hundred and twenty-one, one thousand nine hundred and twenty-two and one thousand nine hundred and twenty-three, except as such valuations may be hereafter changed according to law."

At a number of places in the answer Defendants refer to the fact that the State Tax Commission made the assessment for the year 1920. For instance, in Section 3 of the answer (page 36 of the record) the following occurs:

> "The State Tax Commission had made the assessment of railroad properties in North Carolina for taxation for 1920, and the said assessment had been approved by the General Assembly of North Carolina at the Extra Session of 1920, Chapter 1, and adopted as the basis for taxation for the years 1920 to 1923, inclusive."

Again, at page 52 of the record, Defendants say in their answer:

> "On the other hand, it is averred that the assessment made by the State Tax Commission in and for the year 1920 is and will be, except as reduced by the Commissioner of Revenue to correspond with reductions made on all other real property, the only assessment of property of railroads in North Carolina to be made until 1924."

It seems clear that Defendants are mistaken in saying that no assessment was made.

As to the second plea, we submit that Sections 64 and 65 do provide the method of arriving at the true value of railroads and should have controlled in the making of said assessments.

At the outset, permit us to say that the present position of Defendants that Sections 64 and 65 were not binding in making the assessments of 1920 and 1921 is an afterthought. It is being used for the purpose of detracting attention from the fact which has been conclusively shown that the State Tax Commission under the Revaluation Act of 1919, and the Commissioner of Revenue, in making the reassessment for which Plaintiff applied under Section 28(g), not only departed from the methods prescribed in Sections 64 and 65 but also used different methods in assessing the property of railroads in the same class. This afterthought is not borne out by their answer, which, in Section 5 (Record, page 37) not only admits the binding effect of Sections 64 and 65, but states that said Sections were followed, in this language:

> "*As required by Section* 64 *of the Machinery Act,* the State Tax Commission, in 1920, in determining the value of the tangible and intangible property of the plaintiff for purposes of taxation, gave due consideration to all those modes, methods and factors *therein* required to be considered and used. *And as further required by Section* 65 *of the Machinery Act,* the State Tax Commission gave due consideration to the character of the roadbed and fixed equipment of the plaintiff in North Carolina, to the number of miles of double track in the said State, to the amount of gross and net earnings per mile of road in the State, and to

all other factors which would give a greater or less value per mile of road in this State than the average value for the plaintiff's entire system." (Italics ours.)

If language means anything, Defendants here recognized that said Sections were binding on them.

This is further shown in paragraph (c) of Section 5 of the answer (record, p. 43) in the following language:

"In answer to the allegation on page 23 of the complaint 'that under no one of these accepted tests, viz., capitalization of earnings, and the market value of the stocks and bonds, is the true value of its property as much as the assessment herein complained of,' the defendants aver that the statutes of North Carolina *neither require nor permit that any one of the said tests be used exclusively.* On the other hand, the said statutes *require* that the value of railroad property for taxation be determined by application of the *several factors* and tests *hereinbefore* set forth and that no one of these alone would be an accepted or proper test or method of valuation." (Italics ours.)

In the face of this, how can an assessment made only by capitalizing the net earnings from State and interstate commerce within the State of North Carolina (the method the Tax Commission swore they followed [99]) be said to be compliance with Defendants' duty under the law, as interpreted by Defendants?

The history of Section 64 is correctly set forth

at page 9 of Defendants' supplemental brief in the lower court in the following language:

> "Section 64 of the Machinery Act of 1921, providing the method for assessment of intrastate railroads for ad valorem taxation, is in the same form in which it has appeared in machinery acts for more than twenty years. (See statute.)
>
> "Section 65 of that act, providing the method for the assessment of interstate railroads, is in virtually the same form in which it has appeared in each machinery act for more than twenty years.
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> * * * * *
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> "Thus for more than twenty years ad valorem taxes on railroads have been based on assessment of tangible properties, plus the intangible properties or franchise, and the only material change has been the adding of the proviso and the provision for hearing which are now a part of Section 65. The method prescribed has been virtually the same for twenty years."

The Revaluation Act (Chapter 84, Laws of 1919) contained the following as a part of Section 1:

> "that the said act (Chapter 234, Laws 1917) shall continue in full force and effect, except in so far as the said act may be revised and amended by this session of the General Assembly, and except in so far as it may be in conflict with the provisions of this act, and in all such cases where there may be such conflict the provisions of this act shall govern."

Sections 64 and 65 were contained in said Chapter

234 of the Laws of 1917, are not in conflict therewith and hence were in force.

Section 2 of the Revaluation Act provided that the purpose of the Act was that all property should be valued, in accordance with the rule laid down in the Constitution of the State, at its true value in money. Our contention is not contrary to that, but is that Sections 64 and 65 prescribed the rule for arriving at the true value of railroads.

Section 31 of the Revaluation Act applies to railroads. It provides that the State Tax Commission shall, as of the first of May, 1919, make a complete revaluation of the property of all railroad companies to be used as the basis for computing taxes for the years 1920 to 1923, inclusive, "such revaluation to be made in accordance with the general rule and intent and purpose of this act as to all other property." The purpose is contained in Section 2 of the Act referred to above. Section 31 then provided that the Commission should be furnished with the reproduction cost and with all other information theretofore required by Chapter 234 of the Laws of 1917, which law contained said Sections 64 and 65.

The Revaluation Act was ratified the 11th of March, 1919. The companion Act, ratified March 10, 1919, is Chapter 92 of said Acts, known as the Machinery Act of 1919. The latter Act contains Sections 64 and 65 with reference to the valuing separately of tangible and intangible property and providing the method of valuing railroads. That Act, it will be observed, was in force when the Revaluation Act (Chapter 84) was passed and ratified on the succeeding day, was not repealed

thereby, and provided the method to be pursued by the Tax Commission in valuing a railroad. We submit that Chapter 92 being in force, it was the evident intention of the lawmakers that the true value in money of railroads should be ascertained in accordance with the method set forth in said Chapter 92, as contained in Sections 64 and 65 thereof. If this is not correct, the Tax Commission had nothing to guide it in arriving at the true value. The two Acts should be construed together, which construction we feel the administrative body actually gave to the laws, as shown by their affidavit and by the answer of the Defendants in this case. We therefore say that Sections 64 and 65 applied to the revaluation assessment of 1920.

This brings us to the 1921 assessment. The Court will please bear in mind, as seen in Section 1 of the Act of 1920, supra, the valuation approved by the Legislature was to remain for the years 1921, 1922, and 1923, "except as such valuations may be hereafter changed according to law." The Legislature, at its January Session, 1921, enacted Chapter 38, being "An Act to Amend Chapter 92, Public Laws of 1919, in Relation to the Assessment of Property and Collection of Taxes." Bear in mind that Chapter 92 contained Sections 64 and 65. This Act authorized changes in said assessments in the following Sections:

Chapter 38 provided, in Section 28(a), that county boards might review the valuation of real estate in counties and if they found the assessed value of property in the county as a whole to be in excess of the true value they were authorized to make a percentage reduction in all real values in the county.

In Section 28(b) of said Chapter provision is made for specific complaints by any taxpayer of overvaluation of his real property, and if the county board found the property assessed in excess of the actual value of the property on the first of May, 1921, the property owner had the right to have the same reassessed.

Section 28(g) reads as follows:

> "Sec. 28(g). Any taxpayer owning property assessed originally by the State Tax Commission may make application to the State Tax Commission for a review of the assessment of its property in the same manner herein provided for complaint by property owners before the county boards, and the State Tax Commission may hear and determine such complaints."

It was under the foregoing Section that plaintiff made application for a review of its assessment. It was entitled under the plain language of the Act to have its property reassessed in the same manner as an individual might under Section 28(b).

The reassessment provided for in Section 28(b) as to the property of individuals, and in Section 28(g) as to the property of railroads, had to be made "according to law" in effect at the time of the reassessment. The law in effect for the purpose of arriving at the true value of railroad property at the time plaintiff made application for a review or reassessment of its property, and at the time such reassessment should have been made, is contained in Sections 64 and 65 of Chapter 38 of the Acts of 1921 just referred to. In making the

reassessment or in determining whether Plaintiff's property had been assessed in excess of its true value, the Commissioner of Revenue, who had been substituted for the State Tax Commission, as well as the railroad, was compelled to use the methods provided in said Sections 64 and 65 in arriving at the true value of Plaintiff's property. We do not think that the State can with reason contend that said Sections 64 and 65 do not apply to the action of the Commissioner of Revenue on its application for review for reassessment, or that such Sections do not furnish the method or methods that the said Commissioner of Revenue should follow on such review and reassessment. Evidently the Commissioner of Revenue thought that he had the power to make a reassessment and that he was bound by the method prescribed in Sections 64 and 65, because in the case of Norfolk Southern he made a reassessment, reducing that company's assessment from $27,034,168 to $22,840,932.30, being the cost of reproduction less depreciation.

Upon its application for a review and reassessment Plaintiff had the burden of showing the value of its property in accordance with all the methods prescribed in Sections 64 and 65. Plaintiff showed the value of its property in accordance with such methods, and by any or all those methods combined the showing made was that the value fixed under the Revaluation Act was in excess of the actual value and there was no showing to the contrary. The Revenue Commissioner declined to make any reduction. He thereby adopted the figures and with the figures the wrong method pursued by the State Tax Commission in 1920. This necessarily

follows because the value as arrived at in accordance with the methods prescribed in Sections 64 and 65 was different from that arrived at by the State Tax Commission in 1920. No section of any Act permitted the Tax Commission in 1920 to use the Investment Account, and so far as the Southern is concerned, use only capitalization of earnings within the State. The Tax Commission states that it was furnished the cost of reproduction as near as those figures could be ascertained, and they declined to use them. In 1921, however, the Commissioner of Revenue, as to one member of the class of railroads, that is, the Norfolk Southern, used a reproduction cost. This is discrimination of members of the same class and is held by this court to make any assessment void.

Raymond v. *Chicago Traction Co.,* 207 U. S. 20, 36.

There is one further thought in connection with Sections 64 and 65: If those Sections did not control the Tax Commission and the Commissioner of Revenue, what authority can they point to in the law for assessing separately the tangible and the intangible property? Notwithstanding the State now denies that those Sections were applicable, we find in Section 5 of the answer the following:

> "It is denied that the State Tax Commission or the Commissioner of Revenue has not advised the plaintiff of the separate amounts or values at which its tangible property and its franchise or intangible property were assessed for taxation. The sum of the values of the said tangible property and of the said franchise or intangible property is the basis of ad

> valorem taxation, and the plaintiff, as alleged in the complaint, has been informed of the separate and total assessments." (Record, p. 37.)

Is it not clear that said Sections applied and were used? Is it not further clear that they were compelled to be used in order to legally make an assessment under Section 82 (6½) of Chapter 1 of the Laws of 1920, which provides that every railroad company shall pay a privilege tax, the basis being as follows:

> "The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for ad valorem taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one (0.1%) per cent of *the value so ascertained* by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year."

The point made is that the franchise tax law levied a tax on an ad valorem value ascertained by arriving at the tangible and the intangible value. If the State is right that there was no such provision governing, then it had no basis for assessment of the franchise tax.

The State, having to its satisfaction estab-

lished that the assessment was made by the Legislature, proceeds to say that the assessment made by the Legislature can not be attacked as illegal because it says, "it is the author of law." The decisions quoted do not sustain this and no decision, we submit, can be quoted which will sustain this proposition. The State's power is very broad in the matter of taxation, but it is always subject to the restraints of the State and the Federal Constitution. If the State Constitution provides that all property shall be assessed at its true value and Plaintiff can show that its property is assessed in excess of true value, then the Act of the Legislature making the assessment is unconstitutional and to enforce such a law against Plaintiff denies to it the equal protection of the law afforded by the Federal Constitution.

Defendants contend:

> "The method is in the discretion of the Legislature. It has the power to approve any method which may have been used and if the board may have even directly violated a previously prescribed statutory method, the approval of its act by the Legislature purges it of any illegality." (Appellees' brief, p. 39.)

To begin with, this is an erroneous assumption, because the Legislature did not repeal the method of valuing a railroad. On the contrary, it enacted a law on the preceding day setting forth what method should be followed. But if we assume that the Legislature intended to ratify the assessment of railroads made without method or on a different method, still we say the above proposition of Defendants is unsound.

The Legislature, it is true, may prescribe a method, but that power is controlled by the limitations of the Federal Constitution and the State Constitution. If the Legislature prescribes a method for assessing railroads, each of those railroads is entitled to have its property under the law assessed in accordance with the method prescribed and in force at the time the assessment is made. Defendants admit this on page 38 of their brief, in which they say:

> "If the delegated power to assess is not exercised according to the method prescribed by the sovereign Legislature, then the assessment is not a *legal* assessment and the tax thereon is not a legal tax. This has nothing whatever to do with constitutionality."

Let us assume, which is in accordance with the facts, that the board valued railroads generally by use of their investment account and valued Plaintiff's railroad by capitalization of earnings. Can the Legislature ratify such an assessment and thereby shut off the question of constitutional violation? If Defendants' argument is sound, the Legislature could pass a law reading:

> "All Railroads Shall Be Valued for Assessment by Use of Their Investment Account, except the Southern Railway, Which Shall Be Valued for Assessment by Capitalization of Earnings."

We submit that such a law would fall, because the classification would be arbitrary and because there would be the lack of uniformity prescribed by the

North Carolina Constitution and to enforce such a law would deprive the Southern Railway of the equal protection of the law guaranteed it by the Federal Constitution.

Let us go one step further in the consideration of this matter. The Legislature, if Defendants are right, made the assessment of each individual parcel of property in the State. An individual owned a parcel of land which, we will say, it is admitted was valued in excess of its true value as required by the Constitution. Can it be said that because the Legislature ratified such an assessment that the individual is deprived of the protection given him by the Constitution to have his property assessed at true value and uniformly with other property? If such a proposition can be maintained, then the Legislature has set at naught the Constitutional provision.

The State contends that there is nothing in the pleadings which would raise any question of constitutionality of the assessments. The bill sets forth that Section of the North Carolina Constitution which provides that taxation shall be by uniform rule and that all property shall be taxed according to its true value in money (6). The bill sets forth the method prescribed by law for ascertaining the true value for railroad property (7). The bill avers that the assessment of Plaintiff's property for 1921 was in excess of the true value in money of said property (9). The bill sets forth the facts which show that the statutory method was not followed, and particularly sets forth that this was an interstate railroad and the division of the total value on a mileage basis, as provided in

Section 65, was not complied with (10-11). The bill sets forth that the Commissioner of Revenue followed the valuation found by the Interstate Commerce Commission for certain railroads in North Carolina and that in the assessment of Plaintiff's property they did not base the same on the reproduction cost, and thus violated the Uniformity Section of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States (14-15). The bill avers generally that said assessment (whenever made and by whomever made) was improperly made and was not according to law and was illegal (18).

It is submitted that this sufficiently sets up the unconstitutionality of the 1921 assessment and of the Act by which such assessment was made, assuming that such assessment was actually made by the Legislature. On page 43 of their brief, Appellees recognize this allegation of unconstitutionality. There it is said, "the second year, 1921, they all bring suits in the Federal courts to restrain their collection, *alleges* that said assessments are excessive and hence unconstitutional." Throughout the Bill of Complaint there are allegations as to the violations of both the Constitution of North Carolina and of the United States, and this particular one is referred to briefly for the purpose of showing that the contention of the Appellees that there are not proper allegations in the Bill of Complaint is without foundation.

Defendants argue at length that there was no allegation of deliberate, intentional, and systematic overvaluation. Defendants cite the law and cite

decisions supporting the following proposition:

> "The courts will not review a mere error of fact in assessment of property for taxation, where a lawful principle was followed and no fraud is charged." (Appellees' brief, p. 45.)

There is the crux of the matter. We contend that the averments above set forth the facts and the charge is that it was an illegal assessment, that an unlawful principle was followed in that the statutory method was entirely disregarded. The decisions are plain to the effect that you do not have to aver or prove systematic, deliberate, and intentional overvaluation when you show that the overvaluation is the result of pursuing a wrong principle.

L. & N. v. Greene, 244 U. S. 522, 536.

Defendants contend that Plaintiff is entitled to no relief because we were privileged to complain of these assessments before the Legislature. That is entirely theoretical. Defendants know that what the Legislature did was to approve in a general sense the assessments made, and no particular taxpayer would have been heard who attempted to show to the Legislature that his individual property was overassessed. Again we say, is an individual taxpayer, whose property is admittedly in excess of true value to be bound because the Legislature approved the assessment? In addition, the Tax Commission assumed jurisdiction to hear Plaintiff, but did not hear, and we paid the taxes for 1929 under protest.

Defendants state that in 1927 each of the ends petitioned the Commissioner of Revenue for a re-

hearing and review and were given a rehearing; that on the rehearing one road was reduced four million dollars; and that the Commissioner of Revenue decided, in the exercise of his judgment, that the assessments of the other roads should not be reduced. Plaintiff contends that when it asked for a review it showed that its property was valued in excess of true value. If it had stopped at that point it might have been said that it was an exercise of discretion by the Commissioner of Revenue as to whether the proof was sufficient, but Plaintiff went a step further and showed the Commissioner and showed to the Court that the assessment then before the Commissioner of Revenue was made on a wrong principle and that if the Commissioner of Revenue adopted that assessment the result would be that he would be making the assessment on a wrong principle. Notwithstanding this he adopted the assessment. Plaintiff went a still further step and showed that as to two members of the class of railroads the Commissioner was making a new assessment, reducing the 1921 assessment by millions of dollars, whereas while the Plaintiff did not have then the final value of its reproduction cost as fixed by the Interstate Commerce Commission, yet it had and produced to the Commissioner of Revenue a reproduction cost which the law said should be followed in fixing the tangible value, and notwithstanding this the Commissioner of Revenue declined to heed that evidence but disregarded it entirely. The result was discrimination between members of the same class in that a wrong principle of taxation was followed.

The case of *Davis* v. *Wallace,* decided January

9, 1922, and found on page 48 of Plaintiff's brief, so holds.

Defendants (pp. 64 and 65 of Appellees' brief) cite decisions to sustain the doctrine that in property taxation of interstate railroads the employment of the unit rule does not burden interstate commerce. This Plaintiff has no quarrel with that proposition, but there should be added thereto, "except where abnormal values in other States are shown." We desire to most earnestly impress upon the Court that this Plaintiff complains that in the making of its 1920 assessment and in the review or reassessment of its property in 1921, the tax authorities *declined, failed and refused to follow the unit rule.* We refer the Court to our brief in chief for the facts on this and to record page 99. We have contended all along that in so far as this interstate railroad is concerned the method prescribed by the statutes of North Carolina required that for an interstate railroad the total value should be ascertained, whatever principle was applied, and the North Carolina value should be ascertained by taking a mileage proportion thereof. This is nothing more nor less than the unit rule.

On page 66 of Appellees' brief it is said:

> "As we have seen, the basis of the valuations upon which the assessments in question were made was a unit rule valuation of the tangible properties of the whole railroad, an apportionment of the result of a mileage proportion to North Carolina, and the adding of the value of intangible properties in that State arrived at by a consideration of the factors above enumerated."

It is a fact that this Plaintiff's assessment was not ~~above is correct, by their own contention this~~ Plaintiff's assessment was not made uniformly with other carriers and was not made in accordance with what they announce as a proper method. ~~It is a fact that this plaintiff's assessment was not so made.~~

Defendants say that the Plaintiffs contend that their assessments are burdens on interstate commerce because not controlled by and reduced to what are known as the tentative figures of the Interstate Commerce Commission (Appellees' brief, p. 82).

Defendants have not correctly understood this Plaintiff's contention. At the risk of repetition, we contend with respect to the tentative value of the Interstate Commerce Commission and with respect to reproduction cost submitted by the individual Plaintiffs to the tax authorities, that they should have been heeded and followed in reaching the assessment, because—

1. Under Defendants' contention the valuation was controlled solely by the Revaluation Act, and it was therein specifically provided that reproduction cost be furnished, and if furnished, it must have been furnished for the purpose of being used, and under Section 64 the reproduction cost is required to be used. Defendants assumed to disregard the mandate of the law, because, it said, the data furnished was not complete, and the tax authorities set up for themselves a method. This is contrary to the decision in the case of *Davis* v. *Wallace, supra,* which holds:

> "From what has been said it follows that to sustain the tax in question we should have to hold that the taxing officers, on finding that it could not constitutionally be assessed on the basis specially prescribed in the statute, were at liberty to assess it on another and different basis which the statute shows was not to be applied to corporations of the class to which these railroad companies belong. Of course we can not so hold."

2. Plaintiff contends that the tax authorities used reproduction cost as to two carriers, and failure to use that which was available as to Plaintiff was illegal discrimination as between members of the same class.

See the case of *Magoun* v. *Illinois Bank,* 170 U. S. 283, a quotation from which may be found at page 100 of Appellees' brief.

3. That the reproduction cost furnished by Plaintiff to the Tax Commission and the Commissioner of Revenue and the tentative value as found by the Interstate Commerce Commission, together with the other evidence, showed that if the method prescribed by the statute of North Carolina had been followed, then the result would have been many millions less than that arrived at by the wrong method, from which it follows that the assessment made and now complained of is in excess of the true value of Plaintiff's property.

Defendants, from pages 130 to 137, we think went to unnecessary trouble, because this Plaintiff does not deny the right of the State to levy a privilege tax on a proper basis for the doing of intrastate commerce.

The case of *Osborne* v. *Florida,* establishes the proposition that where there is a privilege tax levied and the wording of the Act makes it doubtful whether it is for the doing of all business or only intrastate business and the Supreme Court of the State has construed the statute and limited it to the doing of business solely within the State, then the Supreme Court of the United States will follow that construction and hold that the Act does not on that point violate the Federal Constitution. To make the case one in point, Defendants should have gone one step further and shown that the Supreme Court of North Carolina had so construed the Act. This, we submit, it has failed to do. In fact, the *Osborne Case, supra,* relied on by the Defendants may be relied upon by the Plaintiff on the question of whether or not the so-called privilege tax in this case is not in truth and in fact a property tax, because on that question we show (p. 81, main brief) that under North Carolina decisions, which would control this Court on the question of construction of a State statute, this tax falls under the head of a property tax rather than a privilege tax.

Much reliance is also placed on the case of *St. L. etc. Ry. Co.* v. *Arkansas,* 235 U. S. 350. As shown by the excerpt quoted from that case on page 143 of Appellees' brief, the Supreme Court accepted the construction of the Act of Arkansas as set forth in the opinion of the Supreme Court of Arkansas, which construction was that the franchise tax was limited to the exercise of corporate powers within the State. Appellant also relies upon that case and quotes from it on page 106 of Appellant's brief.

FRANCHISE OR PRIVILEGE TAX

Defendants, on page 127 of their brief, state Plaintiff's contention as to invalidity of the franchise tax as follows:

> "First, that it is a property tax, not a franchise or privilege tax, and hence is in violation of a supposed prohibition against double taxation in the Uniformity Clause of the State Constitution and in the Fourteenth Amendment."

This Plaintiff does not so contend. It does contend that it is not a franchise tax, but is a property tax, and it says that if it is a property tax, then, inasmuch as it is levied only on certain corporations, including railroads, it violates the Constitution of North Carolina, which requires taxation by a uniform rule of all real and personal property. The State does not contend that they could levy an ad valorem tax or property tax only on railroads, and yet if this is a property tax it would be such a tax levied only on railroads. We do not claim that this is double taxation. As we understand double taxation, it is levying two taxes on the same property.

Defendants contend that neither the State nor the Federal Constitution is violated so long as the State levies a tax impartially on all members of a class. This is, we submit, too broad a statement of the law. If it is an ad valorem tax it violates the Uniformity Clause of the North Carolina Constitution. Furthermore, if it is a property tax it is such an unreasonable and arbitrary classification as would violate the Fourteenth Amendment. This

latter is clearly held in the following language in the case of *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 292 and 294:

> "In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course. 'Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition,' said Mr. Justice Bradley, in *Bell's Gap Railroad* v. *Pennsylvania,* 134 U. S. 232, 237.
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> "And Mr. Justice Brewer, in *Gulf, Colorado & Santa Fe Railway* v. *Ellis,* 165 U. S. 150, 165, after a careful consideration of many cases, said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' "

Plaintiff cited the case of *Worth* v. *Railroad,* 89 N. C. 301, to show that the so-called privilege tax was not in truth a privilege tax but under the North Carolina decisions was a property tax. Defendants' answer (p. 153, Appellees' brief) is:

> "* * * *Worth* v. *Railroad,* 89 N. C. 301; *Provident Institution* v. *Massachusetts,* 6

> Wall. 611, and other cases which hold, not that a tax which is measured by property is necessarily a property tax, but that a tax which is not measured by property, but is measured by amount of business, is not a property tax, but a franchise or privilege tax."

We are not sure that we understand the above quoted reasoning. However, we think that at its face value it means that when a tax is measured by amount of business it is not a property tax but a privilege tax. Per contra, if it is measured by the value of property without relation to the amount of business it is a property tax. We contend that inasmuch as this tax is not measured by the amount of business, but is measured by the value of the entire property of the railroad assessed for ad valorem purposes in the State, it is not a privilege tax but is a property tax.

The citation of the case of *St. L., etc., Ry.* v. *Arkansas,* 235 U. S. 350, does not in any way change the rule as we view it, because in that case the Court followed the construction of the Arkansas statute by the Arkansas Supreme Court. Similarily, we ask the Court to follow the rule laid down by the North Carolina Court in construing this so-called privilege tax. We maintain that if that is done, the tax will be held to be a property tax and not a privilege tax.

The case of *Lacy* v. *Armour Packing Co.,* also referred to in Appellees' brief, is fully discussed in Appellant's brief in chief at pages 83 and 84.

On page 153 of their brief, Appellees state that "It is well settled by many cases that the fact that a tax on or for a privilege (here called franchise,

privilege, license, or excise tax) is measured by property, or its value, does not make it a property tax." In support of this statement several cases decided by this court have been cited. The first one of these is *Magoun* v. *Illinois Trust Bank*, 170 U. S. 283.

That case involved a transfer or inheritance tax law of the State of Illinois. It is settled that "the right to take property by devise or descent is a creature of the law and not a natural right—a privilege, and therefore, the authority which confers it may impose conditions upon it." The tax imposed by the State of Illinois was not one on property, but one on the succession; that is, the right to take the property. There was under the Illinois statute a classification according to the amount of the property received, and the amount of the tax imposed depended upon the classification into which the particular succession fell. The value of the privilege of succeeding is necessarily dependent upon the amount of the property to which there is succession.

The next case cited is *Clark* v. *Titusville,* 184 U. S. 329. What this court held in that case is shown in the only head note thereto, which is as follows:

> "The City Government of Titusville, in Pennsylvania, imposed a license tax upon persons carrying on certain occupations in that city. This court holds that it was a tax on the privilege to do business, regulated by the amount of the sales, and was not repugnant to the Constitution of the United States."

In other words, this was merely a sales tax, measured by the amount of the sales and had no reference to the amount of the property or value of the property used in the business.

The next case cited is that of *Keeny* v. *New York,* 222 U. S. 525. That case involved a transfer tax upon the privilege of acquiring property by an instrument taking effect on the death of the grantor, or property conveyed in contemplation of the death of the grantor. This presents the same situation as an inheritance tax. A tax is imposed upon the privilege of acquiring property in the manner set out in the statute. This court held that there was no difference in acquiring property in this manner than by legatees and devisees under a will. The privilege tax is measured by the extent to which the privilege is enjoyed, and the extent to which the privilege is enjoyed can not be determined without reference to the value of the property received.

Another case cited is the *Baltic Mining Company* v. *Mass.,* 231 U. S. 68. This case involved an excise tax imposed by the laws of the State of Massachusetts "to be assessed by the Tax Commissioner of one-fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition: but the amount of such excise tax shall not in any one year exceed the sum of $2,000.00."

The situation presented in the Baltic Mining Company case is obviously different from that presented in this case. In the Baltic Mining Company case the privilege tax is measured by the par value of its authorized capital stock without refer-

ence to the value of the property employed in the State and the maximum amount of such privilege tax is $2,000.

Kansas City Railway v. *Kansas,* 240 U. S. 227, involved a privilege tax imposed upon domestic corporations by the laws of the State of Kansas. The amount of this annual fee is graduated according to the amount of its paid up capital stock. For example: as stated in the opinion, "when this capital stock does not exceed $10,000, the fee is $10.00; when it exceeds $10,000 and is not over $25,000, the fee is $25.00; and there are further increases, graduated as stated, until the maximum fee of $2,500.00 is reached, that sum being payable in all cases where the paid up capital stock exceeds $5,000,000."

A consideration of these cases serves rather to emphasize the difference between them and the methods employed, and this case and the methods employed. The so-called privilege or franchise tax is calculated upon the value of all of plaintiff's property in North Carolina for ad valorem taxes. In this ad valorem value there is included the value of the privilege of doing business in the State of North Carolina. In other words, Plaintiff has its so-called privilege tax measured not only by the value of the property employed in that State, but also by the value of the privilege for the use of which this so-called privilege tax is imposed. A somewhat similar situation would be presented if under the inheritance tax laws the privilege tax was measured by the value of the property received, plus the value of the privilege of being permitted to receive it.

We do not think any case can be found in this Court where, in the absence of previous construction of the State law by the State court that such a tax is a privilege tax, the rule is announced that a tax is a privilege tax which is not in any way based upon the amount of business done or the value of the privilege exercised, but upon the ad valorem assessment of the taxpayer.

The Tax Commission and these Defendants state that they used the investment account as the basis for ascertaining the ad valorem value. This is set forth in Appellees' brief on page 61 as follows:

> "Therefore the mileage proportion of the investment account was taken as the basic figure for tangible property value in the State, and the gross earnings proportion of the investment account was taken as the basic figure for intangible values in the State plus the value of the tangible property, or for total of tangible and intangible property in the State."

Suppose there were two lawyers doing business in North Carolina. Lawyer "A" had a law library valued and assessed for ad valorem tax purposes at $10,000.00 and did a business of $1,000.00 a year; and lawyer "B" had a law library valued and assessed for ad valorem tax purposes at $1,000.00 and did a $10,000.00 practice per year. Can it be said that the privilege tax for practicing law would be legal as applied to those two men which would be based not upon the amount of business done but on the ad valorem assessment, thereby taxing lawyer "A" ten times the amount lawyer "B" is taxed for doing one-tenth of the business done by lawyer "B"?

Can it be said that a tax levied under such facts on the ad valorem value is a privilege tax regardless of what it is called? Is it anything but a tax on property? If it is a property tax, it violates the Uniformity Section of the North Carolina Constitution. If it is a property tax, it can not be upheld, because it is in the teeth of Section 3 of the Revenue Act of 1921, which provides that for the year 1921 "no tax on any property in the State shall be levied for any of the uses of the State Government, etc."

Respectfully submitted,

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